15-826

Revised Sub Docs
Fed. Courts

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~408~~. 33

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

FILED DECEMBER 14, 1870.

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1 In the court of common pleas of Dauphin County, Pennsylvania.

Among the records of the court of common pleas of Dauphin County, Pennsylvania, to January term, 1868, No. 241, it is contained as follows, to wit:

Docket entries.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE AND LACKAWANNA AND WESTERN Railroad Company.

Appeal by defendant from the settlement of the auditor general and state treasurer.

January 18, 1868. Appeal, specifications of objections, copy of account, and bond filed.

April 1, 1868. Narr. and copy of account filed. Same day rule on defendant to plead on 30 day' notice or judgment, ex rule.

April 2, 1868. Defendant pleads "Nil debet."

May court, 1868. On issue list.

May 4, 1868. Continued.

November term, 1868. On issue list, and continued.

March adjourned court, 1869. On issue list, and continued by consent.

2 April court, 1869. On issue list.

April 19, 1869. Commission to New York on behalf of defendant.

April 22, 1869. Ex. commission, by consent.

May 6, 1869. Trial ordered, jury called. Come, &c., twelve good and lawful men of the county of Dauphin, duly selected, summoned, &c., who, being all sworn or affirmed according to law, do say—May 6, 1869—that they find in favor of the plaintiff for twenty-one thousand five hundred fifty eight and $\frac{05}{100}$ dollars (21,558 05.)

May 13, 1869. Notes and charge of court filed. Same day judgment on the verdict, and same day deposition of A. J. Odell filed.

July 7, 1869. Writ of error from supreme court received and filed.

SEAL OF THE COURT OF COMMON PLEAS, DAUPHIN CO.

Certified from the record, May 9, 1870.
JOS. H. NISSLEY,
Proth'y.

3 In the court of common pleas of Dauphin County, Pennsylvania.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

No. 241. January term, 1868.

In the matter of the account settled November 18, 1867, by the auditor general and state treasurer of the Commonwealth of Pennsylvania against the Delaware, Lackawanna and Western Railroad Company, for the amount of taxes claimed to be due by the company under the act of April 30, 1864, entitled "An act imposing additional tax for State purposes, and to abolish the revenue board," for State taxes claimed to be due by the holders of the bonds of said company from said bondholders in payment of the interest coupons of said bonds.

The Delaware, Lackawanna and Western Railroad Company enters

an appeal from said settlement of the auditor general and state
4 treasurer of the Commonwealth of Pennsylvania to the court of common pleas of Dauphin County, pursuant to the acts of general assembly for such cases made and provided, and files the following specified objections to said settlement.

First. The said act of April 30, 1864, does not apply to the Delaware, Lackawanna and Western Railroad Company, inasmuch as there is no law of Pennsylvania imposing a State tax upon the bonds or the interest upon the bonds of said Company.

Second. The act of April 30, 1864, under which the aforesaid settlement was made imposes a duty upon the company to retain from its bondholders the amount of taxes "imposed by existing laws," and there was no existing law before the act of April 30, 1864, imposing any tax upon the bonds of this company owned or held by persons non-resident in this Commonwealth.

Third. No tax had been assessed upon the bondholders or the said bonds or the interest due thereon, when the said payments of inter-
5 est were made upon which the tax is charged by the said settlement, and the said company was not therefore legally bound to deduct and retain from the interest the tax charged against it in the said settlement.

Fourth. Said bonds are principally held by non residents, and are, therefore, not subject to said tax.

Witness the corporate seal of the said company affixed and duly attested by the secretary thereof, this 13th day of January, 1868.

{ SEAL OF THE D., L. & W. R. R. CO. } CHARLES E. CARRYL, *Secretary.*

6 In Dauphin common pleas. No. 241, Jan'y term, 1868.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of Delaware, Lackawanna and Western Railroad Company, of a plea, that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her. For that whereas the said defendants, on the 18th day of November, A. D. 1867, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of eighteen thousand four hundred and seventy-seven $\frac{46}{100}$ dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth, and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon at the rate of twelve per centum per annum, from and after the expiration of one month from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, for tax on loans, per act of April 30, 1864, from April 30, 1864, to April 30, 1866, which said account was, on the 18 day of November, A. D. 1867, submitted to, revised, and approved by the state treasurer, and a copy thereof, within thirty days thereafter, sent by the said auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants, and unappealed from. Whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and

from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth, in the said account so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded. And being so indebted, the said defendants afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff, on request, the said last-mentioned sum of money:

And whereas, also, the said defendants, on the day and year in the first count mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there had and received by the said defendants, to and for the use of the said plaintiff: And, also, a further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general of this Commonwealth, against the said defendants, on the day and year in the first count mentioned, for tax on loans, per act of April 30, 1864, and approved by the state treasurer on the day and year in the first count mentioned:

And whereas afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff, on request, yet the said defendants have disregarded their said promises and, although often requested so to do, have not as yet paid any of the said several sums of money, or any part thereof, to the damage of the said plaintiff of one hundred thousand dollars, and therefore she brings suit, &c.

JAMES W. M. NEWLIN,
Deputy Attorney General.
For BENJAMIN HARRIS BREWSTER,
Att'y General.

7 *Copy of account.*

Delaware, Lackawanna and Western Railroad Company, (A. J. Odell, treasurer,) in account with the Commonwealth of Pennsylvania, Dr.

For tax on loans, as per act of April 30, 1864:

1864.	Funded debt, $3,470,500; tax, at the rate of 3 mills per annum, for 8 mo's, from April 30, 1864, to Dec. 31, 1864, upon $\frac{2}{41}$ parts of the above amount, representing the proportion of the road within the State of Pennsylvania	$4,740 19
1865.	Average debt, $3,433,500; tax, 3 mills on $\frac{2}{41}$ parts.	$7,034 48
1866.	Average debt, $3,390,500; tax, 3 mills on $\frac{2}{41}$ parts	$6,946 39
		$18,721 06
	Treasurer's commission	$243 60
		$18,477 46
	Due Commonwealth	$18,477 46

AUDITOR GENERAL'S OFFICE,
Harrisburg, Nov. 15, 1867.

Settled and entered.

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE,
Harrisburg, Nov. 18, 1867.

Approved.

W. H. TAGGART,
For W. H. Kemble, State Treasurer.

AUDITOR GENERAL'S OFFICE,
Harrisburg, March 30, 1868.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

SEAL OF THE AUDITOR GENERAL'S OFFICE OF PENN'A.

D. C. MAURER,
For Auditor General.

(Indorsed:) No. 241, Jan'y term, 186 . Commonwealth of Pennsylvania, vs. Delaware, Lackawanna and Western Railroad Company. Narr. and copy of account. Filed April 1, 1868.

8 In the court of common pleas of Dauphin County, Pennsylvania, ss:

THE COMMONWEALTH OF PENNSYLVANIA *vs.* THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } January term, 1868. No. 241.

And now, to wit, April 1, 1868, rule on defendants to plead in 30 days, or judgment sec. reg.

J. W. M. NEWLIN,
Dep. Att'y General, Pa.

And now, to wit, April 2, 1868, defendant pleads "Nil debet."

J. C. KUNKEL,
Att'y for Defendant.

9 In the court of common pleas of Dauphin County, Pennsylvania.

THE COMMONWEALTH OF PENNSYLVANIA *vs.* THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 241, January T., 1868.

Appeal.—Plea. "Nil debit."

Notes of trial.

Return, dated June 4, 1867, of the debts bearing interest, and the amount thereof, read as follows, to wit:

10 *Report of the debt bearing interest of the Delaware, Lackawanna & Western Railroad Company, during the period from April* 30, 1864, *to April* 1, 1867, *and the rate per cent. per annum of the interest thereon, and the date and amount of the several payments of interest during the period aforesaid.*

Bonds payable in 1871, (interest *a* 7 per cent.)

6 mo's int. on	$627,000,	payable	July 1, 1864	$21,945 00
Do.	619,000,	"	Jan. 1, 1865	21,665 00
Do.	605,000,	"	July 1, "	21,175 00
Do.	600,000,	"	Jan. 1, 1866	21,000 00
Do.	582,000,	"	July 1, "	20,370 00
Do.	572,000,	"	Jan. 1, 1867	20,020 00
				126,175 99

Bonds payable in 1875, (interest *a* 7 per cent.)

6 mo's int. on	$1,144,500,	payable	Oct. 1, 1864	$40,057 50	
Do.	1,134,500,	"	Ap'l 1, 1865	39,707 50	
Do.	1,131,500,	"	Oct. 1, "	39,602 50	
Do.	1,124,000,	"	Ap'l 1, 1866	39,340 00	
Do.	1,122,500,	"	Oct. 1, "	39,287 50	
Do.	1,122,500,	"	Ap'l, 1, 1867	39,287 50	
					237,282 50

Bonds payable in 1881, (interest *a* 7 per cent.)

6 mo's int. on	$1,699,000,	payable	Sep. 1, 1864.	$59,465 00	
Do.	1,689,500,	"	M'ch 1, 1865	59,132 50	
Do.	1,686,500,	"	Sep. 1. "	59,027 50	
Do.	1,677,500,	"	M'ch 1, 1866	58,712 50	
Do.	1,675,000,	"	Sep. 1, "	58,625 00	
Do.	1,668,000,	"	M'ch 1, 1867	58,380 00	
					353,342 50
					716,800 00

CITY & COUNTY OF NEW YORK, *ss:*

Personally appeared before me, a commissioner for Penn'a, in and for the city & county aforesaid, A. J. Odell, treasurer of the Delaware, Lackawanna & Western Railroad Company, who, being duly sworn according to law, did depose and say that the above report is just and true, according to the best of his knowledge and belief.

A. J. ODELL.

Sworn and subscribed before me, this 4th day of June, A. D. 1867.

W'M WALTER PHELPS,
Commissioner for Penn'a in New York.

11 Account settled 18 Nov., 1867, read; tax $18,477 46, as follows, to wit:

Delaware, Lackawanna & Western Railroad Company, (A. J. Odell, treasurer,) in account with the Commonwealth of Pennsylvania, Dr.

For tax on loans as per act of April 30, 1864:

1864.	Funded debt, $3,470,500; tax, at the rate of 3 mills per annum, for 8 mo's, from April 30 to Dec. 31, 1864, upon $\frac{2}{3}\frac{7}{7}$ parts of the above amount, representing the proportion of the road within the State of Penn'a..	$4,740 19
1865.	Average debt, $3,433,500; tax, 3 mills on $\frac{2}{3}\frac{3}{7}$ parts	$7,034 48
1866.	Average debt, $3,390,500; tax, 3 mills on $\frac{2}{3}\frac{3}{7}$ parts	$6,946 39
		$18,721 06
	Treasurer's commissions	$243 60
	Due Commonwealth	$18,477 46

AUDITOR GENERAL'S OFFICE, PA.,
Harrisburg, Nov. 15, 1867.

Settled and entered.

D. C. MAURER,
For J. F. Hartranft, Auditor General.

TREASURY OFFICE, PA.,
Harrisburg, Nov., 18, 1867.

Approved.

M. H. TAGGART,
For W. H. Kemble, State Treasurer.

AUDITOR GENERAL'S OFFICE,
Harrisburg, March 30, 1868.

I hereby certify that the above is a true copy of the original remaining on file in this department. Witness my hand and the seal of the office the day & year aforesaid.

{ SEAL OF THE AUD. GEN. OFFICE, PA. }

D. C. MAURER,
For Auditor Gen.

12 Plaintiff rests.

Defence.

Specifications of objections to the settlement of the auditor general, and state treasurer read, as follows, to wit:

THE COMMONWEALTH OF PENNSYLVANIA
vs.
DELAWARE, LACKAWANNA AND WESTERN R. R CO.

In the matter of the account settled Nov. 18, 1867, by the auditor general and state treasurer of the Commonwealth of Pennsylvania against the Delaware, Lackawanna and Western Railroad Company for the amount of taxes claimed to be due by the company under the act of April 30, 1864, entitled "An act imposing additional tax for State purposes, and to abolish the revenue board," for State taxes claimed to be due by the holders of the bonds of said company from said
13 bondholders in payment of the interest coupons of said bonds.

The Delaware, Lackawanna and Western Railroad Company enters an appeal from said settlement of the auditor general and state treasurer of the Commonwealth of Pennsylvania, in the court of common pleas of Dauphin County, pursuant to the acts of general assembly for such cases made and provided, and files the following specified objections to said settlement:

First. The said act of April 30, 1864, does not apply to the Delaware, Lackawanna and Western Railroad Company, inasmuch as there is no law of Pennsylvania imposing a State tax upon the bonds or the interest upon the bonds of said company.

Second. The act of April 30, 1864, under which the aforesaid settlement was made, imposes a duty upon the company to retain from its bondholders the amount of taxes "imposed by existing laws,"
14 and there *was* no existing laws before the act of April 30, 1864, imposing any tax upon the bonds of this company, owned or held by persons non-resident in this Commonwealth.

Third. No tax had been assessed upon the bondholders, or the said bonds, or the interest due thereon when the said payments of interest were made upon which the tax is charged by the said settlement, and the said company was not therefore legally bound to deduct and retain from the interest the tax charged against it in the said settlement.

Fourth. Said bonds are principally held by non-residents of Pennsylvania, and are therefore not subject to said tax.

Witness the corporate seal of the said company, affixed and duly attached by the secretary thereof, this 13 day of January, 1868.

{ SEAL OF THE D., L. & W. R. R. CO. }

CHA'S E. CARRYL,
Secretary.

15 Depositions of A. J. Odell, read as follows, to wit:

16 In the court of common pleas of Dauphin County, Pennsylvania.

DAUPHIN COUNTY, *ss:*

{SEAL OF THE COURT OF COMMON PLEAS OF DAUPHIN COUNTY.} Commonwealth of Pennsylvania to R. A. Wright, esq., greeting:

Know ye that in confidence of your prudence and fidelity, we have appointed you and by these presents do give unto you full power and authority in pursuance of an order made in our court of common pleas, of Dauphin County, in a certain cause there pending, No. 241, Jan'y term, 1868, wherein The Commonwealth of Pennsylvania is plaintiff, and The Delaware, Lackawanna and Western Railroad is defendant, to call before you at a certain day and place, by you for that purpose to be appointed, all and every person and persons who may be named to you, as well on the part of the plaintiff as on the part of the defendant, or either of them, as witnesses, touching the premises mentioned
17 in the interrogatories hereto annexed, and reduce their testimony to writing; and when you have so done you are to send the same before us in our court of common pleas aforesaid, together with the interrogatories and this writ, under your hands and seals, or of such as you shall act therein.

In testimony whereof we have caused the seal of our said court to be hereunto affixed.

Witness my hand at Harrisburg the 22d day of April, A. D. 1869.

JOS. H. NISSLEY,
Prothonotary.

18 In the court of common pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA *vs.* THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 241, January T., 1868.

In Dauphin common pleas.

And now, to wit, April 19, 1869, the defendant in the above-stated cause enters a rule for a commission to issue to the city of New York, in the State of New York, to take the testimony of a witness to be produced, sworn, or affirmed, and examined on behalf of the defendant, and nominates as commissioner to take such testimony, R. A. Wright, esq., of No. 26 Exchange Place, New York City, and files the following interrogatories.

J. W. SIMONTON,
Att'y for Defendant.

To JOS. H. NISSLEY, esq.,
Prothonotary.

To BENJAMIN HARRIS BREWSTER,
Attorney General of the State of Pennsylvania.

19 SIR: You will please take notice that the foregoing rule, with the interrogatories proposed to be put to the witness, has been this day entered and filed in the office of the prothonotary of the above-

stated court, and that said commission will issue on the expiration of fifteen days from this date, within which time you may file cross-interrogatories and nominate a commissioner, if you think proper so to do.

J. W. SIMONTON,
Att'y for Defendant.

APRIL 19, 1869.

In Dauphin County common pleas. No. 241, January term, 1865.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company.

Interrogatories to be propounded to A. J. Odell, esq., of the city of New York, a witness to be produced, sworn or affirmed, and examined on behalf of defendant in the above-stated case.

First. Are you an officer of the company defendant in this
20 case? If so, what position do you hold, and where is your office located?

Second. State, if you can, the amount of the funded debt of said company defendant, and the nature of the obligations by which it is represented and secured.

Third. State, if you can from your own personal knowledge, whether any of said debt is owing to, and any of such obligations are held and owned by, persons who are not residents in nor citizens of the State of Pennsylvania.

Fourth. State, if you can from your own personal knowledge, whether any of said debt is owing to, and any of said obligations are held by, persons who are not residents in nor citizens of the United States.

Fifth. State, if you can from your own personal knowledge, what amount of said debt is owing to, and what amount of said obligations are held by, persons who are not residents in nor citizens of the State of Pennsylvania.

21 Sixth. State, if you can from your own personal knowledge what amount of said debt is owing to, and what amount of said obligations are held by, persons who are not residents in nor citizens of the United States.

Seventh. State if you have in your possession a registry of any part or series of the obligations by which the funded debt of said company defendant, is represented and secured.

Eighth. If you have such registry in your possession, state if it shows the names and residences of the holders and owners of the bonds or obligations registered.

Ninth. If you answer the last preceeding interrogatory in the affirmative, state where such registry shows the residences of such holders and owners to be, whether within or without the State of Pennsylvania, and whether any of them without the United States; and if so, what amount held out of the State of Pennsylvania, and what amount held out of the United States.

22 Tenth. What amount of the obligations, by which the funded debt of said company defendant is represented and secured, is held and owned by, and what amount of said debt is owing to, persons resident in the State of Pennsylvania?

Eleventh. If you can, please attach a copy of each of the several issues of the bonds by which the funded debt of said company defendant is represented.

Twelfth. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties in this case, or either of them, or material to the subject of this, your examination, or the matter in question in this case? If so, state the same as fully as if you were particularly interrogated thereto.

J. W. SIMONTON,
Att'y for Defendant.

23 In Dauphin County common pleas. January T., 1868.

THE COMMONWEALTH OF PENNSYLVANIA
vs.
THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company. } No. 241.

And now, April 21, 1869, the attorney general of the Commonwealth accepts service of notice of the within rule to take deposition in New York City, in the above suit, and assents to the appointment of R. A. Wright, esq., of 26 Exchange Place, as commissioner. The attorney general further assents to waive the notice of 15 days, and that the commission shall issue immediately, and files the cross-interrogatories as follows:

LEWIS WALN SMITH,
Deputy Att'y Gen.,
For Att'y Gen.

To JOSEPH H. NISSLEY,
Prothonotary.

Cross-interrogatories to be propounded to *O. F.* Odell, of the
24 city of New York, a witness produced, sworn or affirmed, and examined on behalf of the defendants in the above-stated case.

First. If you answer the first interrogatory of the defendant in the affirmative, state what are the duties of your position as officer of the company defendant and how long you have been connected with said company defendant as one of its officers.

Second. If you answer the 3d interrogatory of the defendant in the affirmative, state explicitly and in full the sources from which you derive your personal knowledge of where the holders of the debt of the company defendant reside.

Third. State, if you can, whether or not any or all the debt of the company defendant is in the form of negotiable bonds. If not all, state what amount of the debt is in that form, and if you have any means of information yourself as to the residence of the holder of such negotiable forms of indebtedness.

LEWIS WALN SMITH,
Dep. Att'y Gen.,
For Att'y Gen.

25 Deposition of A. J. Odell, a witness produced, sworn and examined on the 4th day of May, in the year of our Lord one thousand eight hundred and sixty-nine, at No. 26 Exchange Place, in the city of New York, county of New York, and State of New York, by virtue of a commission issuing from the court of common pleas of Dauphin County, State of Pennsylvania, to R. A. Wright directed, for the examination of witness in a certain cause depending in said court, wherein The Commonwealth of Pennsylvania is plaintiff, and The Delaware, Lackawanna and Western Railroad Company is defendant.

A. J. ODELL, of the said city of New York, aged thirty-six years, or thereabouts, being produced, sworn and examined on the part of the defendant, deposeth as follows:

First. To the first interrogatory, on the part of the defendant, he answers as follows: "I am an officer of the company defendant in this case. I occupy the position of treasurer, and my office is at No. 26 Exchange Place, in the city of New York."

26 Second. To the second interrogatory, on the part of the defendant, he answers as follows: "The present funded debt of the said company, defendant herein, secured by liens upon property being within the State of Pennsylvania, amounts to three millions three hundred and eight thousand dollars, ($3,308,000 00,) and the nature of the obligations by which it is secured and represented is as follows: Five hundred and sixty-four thousand dollars, ($564,000 00,) seven (7%) per cent. bonds of the Lackawanna and Western Railroad Company, payable in 1871, and secured by a mortgage on the said company's railroad between Great Bend and Scranton, Penn'a, with its equipment and appurtenances, together with the coal lands owned by said company. Also, one million one hundred and eleven thousand dollars, ($1,111,000 00,) seven per cent. (7%) bonds of the Delaware, Lackawanna and Western Railroad Company, payable in 1875, and secured by a mortgage on the said company's railroad between Great Bend, Penn'a, and the Delaware River, and its appurtenances, including the Lackawanna and

27 Western Railroad, which, by merger with the Delaware and Cobb's Railroad, became the Delaware, Lackawanna and Western Railroad. Also, one million six hundred and thirty-three thousand dollars, ($1,633,000 00,) seven per cent. (7%) bonds of the Delaware, Lackawanna and Western Railroad Company, payable in 1881, and secured by a mortgage on the said company's railroad between Great Bend, Pa., and the Delaware River, and its equipments and appurtenances, together with the coal lands owned by said company."

Third. To the third interrogatory, on the part of the defendant, he answers as follows: "I do know, of my own personal knowledge, that a portion of said funded debt is owing to, and a portion of said obligations are owned by, persons who are not residents in nor citizens of the State of Pennsylvania."

Fourth. To the fourth interrogatory, on the part of the defendant, he answers as follows: "I do, of my own personal knowledge, that a portion of said funded debt is owing to, and a portion of said obligations are owned by, persons who are not residents in nor citizens of the United States."

28 Fifth. To the fifth interrogatory, on the part of the defendant, he answers as follows: "I can say, from my own personal knowledge, that not less than two millions of dollars ($2,000,000 00) of said

funded debt is owing to, and not less than that amount of said obligations is owned by, persons who are not residents in nor citizens of the State of Pennsylvania."

Sixth. To the sixth interrogatory, on the part of the defendant, he answers as follows: "I can say from my own personal knowledge that not less than one hundred thousand dollars ($100,000 00) of said debt is owing to, and not less than that amount of said obligations is held by, persons who are not residents in, nor citizens of the United States."

Seventh. To the seventh interrogatory, on the part of the defendant, he answers as follows: "I have in my possession a registry of a portion of the obligations by which the funded debt of said company defendant, is represented and secured."

Eighth. To the eighth interrogatory, on the part of the defendant, he answers as follows: "The said registry shows the names and
29 *and* residences of the holders and owners of a portion of the bonds or obligations; that is to say, of all that are known as registered bonds."

Ninth. To the ninth interrogatory, on the part of the defendant, he answers as follows: "The said registry shows the owners of said bonds, so far as said bonds are registered, to reside without the State of Pennsylvania, and a part of them without the United States. The amount of said bonds or obligations, held out of the State of Pennsylvania, as shown by said registry, is ($1,961,000 00) one million nine hundred and sixty-one thousand dollars. The amount held out of the United States (and included in the sum last mentioned) is as shown by the registry, ($70,500 00,) seventy thousand five hundred dollars."

Tenth. To the tenth interrogatory, on the part of the defendant, he answers as follows: "None of the said bonds or obligations are registered in the name of any person or persons resident in the State of Pennsylvania, and of the remainder of said debt, viz, the bonds not re-
30 gistered, I have no knowledge, personal or otherwise, that any portion is held or owned by, or owing to, persons resident in the State of Pennsylvania."

Eleventh. To the eleventh interrogatory, on the part of the defendant, he answers as follows: "I am unable to procure a copy of either of the several issues of said bonds for attachment hereto."

Twelfth. To the twelfth interrogatory, on the part of the defendant, he answers as follows: "The bonds or obligations of which a statement is comprised in the answer to the second interrogatory above, are all payable, both principal and interest, in the city of New York. I have personally paid the coupons on all the bonds of the company, defendant herein, for more than fifteen years, and during the greater part of that time, I have been and am still personally acquainted with nearly all of the holders of said bonds.

Thirteenth. To the first cross interrogatory, on the part of the
31 plaintiff, he answers as follows: "The duties of the treasurer of this company, defendant, are to have charge of its accounts; to transfer and to register all of its stock and bonds, and to receive and disburse all of its moneys, including in special accounts sums payable for interest on said bonds. I have been an officer of said company since the first day of January, 1855.

Fourteenth. To the second cross interrogatory, on the part of the plaintiff, he answered as follows: "The sources from which I derive my personal knowledge of the residence of the owners or holders of the debt of the company defendant are these: I have been personally acquainted with nearly all of the bondholders for from five to fifteen

years last past. I have, during that time, personally paid the interest on said bonds, as it fell due, and uniformly to the same persons. The registry, which has been referred to in previous answers and which has been in my possession and kept by me and under my personal supervision ever since the original issue of the bonds, has been uniformly
32 confirmed by my personal knowledge."

Fifteenth. To the third cross interrogatory, on the part of the plaintiff, he answers as follows: "Of the entire funded debt of the company, defendant, as stated in the answer to the second direct interrogatory, the sum of ($807,000 00) eight hundred and seven thousand dollars is in the form of negotiable bonds, that is to say, is payable to bearer. I have means of informing myself as to the residence of the holders of such negotiable bonds, as follows: By personal acquaintance with the persons who have for a long time uniformly collected the interest on the same bonds and a personal knowledge of their residence; by personal correspondence, extending through a long period, with the holders of many of said bonds who are also owners of stock of this company, the defendant, by general report and public notoriety; by information necessarily obtained by myself in 1857, in consequence of the company defendant suspending payment of its interest at that
33 time. I was at that time specially charged to obtain personal knowledge of the residence of the bondholders, and the information was then perpetuated as a matter of precaution; and it has ever since been necessary in the discharge of my duties as officer of the company to obtain and preserve such information whenever there has been any change of ownership of either stock or bonds.

A. J. ODELL.

R. A. WRIGHT, *Commissioner.*
MAY 4, 1869.

(Endorsed as follows:)

The execution of this commission appears in a certain schedule hereto annexed.

R. A. WRIGHT,
Commissioner.

MAY 4, 1869.

Filed in Dauphin common pleas. May 13, 1869. Jos. H. Nissley, proth'y.

34 *Charge of the court.*

On the 18th of November, 1867, the accounting department settled an amount against the defendant for taxes claimed to be due to the Commonwealth, amounting to $18,477 46, for the years 1864, '5 and '6. From this settlement, the railroad company appealed, claiming that there was no law charging a tax on its bonds; consequently, it cannot be required to collect or retain the same; that this tax was not assessed in any legal mode, and, as a large portion of the bondholders were non-residents of Pennsylvania, their obligations could not be lawfully taxed, nor could the company retain the same from their interest falling due half-yearly. The facts, so far as we can gather them from the evidence, show that the funded debt of this company, consisting of bonds to the amount of nearly three and one-half million of dollars, was secured by mortgages on its road, franchises, and real estate within the State of Pennsylvania. There is nothing showing that any part

of the road mortgaged is situated outside of this State, although it might be inferred from the statement of the account. Neither the specifications or the appeal, the return to the department, nor the deposition proves it. The evidence shows that of these bonds, about two millions were held by citizens of other States, perhaps one hundred thousand by foreigners, and the residue most probably by Pennsylvanians.

The first question presented is: Are these mortgages and the money they secure taxable and taxed under our laws? They are certainly embraced within the words of the 32nd section of the act of April 29, 1844, although we might infer that it was the legislative intention to have the tax assessed against the holder of the mortgage or debt in the ordinary method of assessing taxes, especially as the same obligations were made taxable for county, township, and school purposes, by various laws. The act of May 1st, 1854, shows clearly the intention to
35 assess these obligations for State purposes only, and they are exonerated from all other taxes. Although we may fairly infer the legislative intention to impose this tax for State purposes, yet no method was devised of ascertaining or collecting the amount until the act of April 30, 1864, was passed, the third section of which required a full return of all corporation indebtedness to be made to the auditor general, and the tax to be retained for the use of the State, by the corporation officers who paid the interest. A similar provision is found in the fourth section in regard to county or municipal indebtedness. This was a public law of which the respective officers were required to take notice, without their attention being called to its provisions by the State accounting department. That the tax now in controversy is valid and binding, both on the corporation and its creditor, is clearly settled in Maltby vs. The Philadelphia and Reading Railroad Company, 2 P. F. Smith, 140, and that too whether the creditor resides in Pennsylvania or elsewhere. The non-resident can be taxed for the protection which his debt receives from our laws by granting and securing the franchises of the company to which he has entrusted his money. In fact, every question presented and argued in the present case was carefully considered and decided by the Supreme Court in that case, and is binding on us, unless our law comes in conflict with the Federal Constitution. To prove that it does, and that the legislature cannot tax the personal property or choses in action of non-residents here, we are referred to the opinion of Chief Justice Chase in Jackson vs. The Northern Central Railway Company, who held that these same laws had no binding effect on the citizens of other States, or the subjects of foreign governments; but it must be borne in mind that when that case went by appeal into the Supreme Court of the United States, no opinion was expressed or even intimated on that subject, but the cause was ruled on an entirely different principle—the impossibility of enforcing the mortgage securing this debt, if undertaken to be apportioned according to the length of the road in the States of Maryland and Pennsylvania, as was done by our officers, and the idea that if one State could tax the security, the other could also. The unwillingness to countenance this was running counter to a well-settled principle of Penn-
36 sylvania jurisprudence, that there is nothing illegal in double taxation. Although not often done by our laws, there is nothing to prevent both States from taxing the debt to its full amount, if they think proper. It must be conceded that the real estate out of our jurisdiction, or personal property beyond our borders, cannot generally be taxed, as neither are protected by our laws. Yet it never has been

held that choses in action, to which we do give protection, and the means of enforcing and recovering, cannot be compelled to bear their share of the public burthens, although held by non-residents of the State. We have even taxed the personal effects of our citizens under the collateral inheritance laws, when the actual situs was out of the State, the courts holding that the domicil of the resident drew to it the right of property. Until the Supreme Court of the United States shall decide that the debts due to non-residents cannot be taxed by other States, we shall adhere to the decisons of our own courts, and enforce our laws. Thus far we have no such decision that we have been able to discover. The court was referred in the argument to the opinion of the supreme court of New Jersey in Potter vs. Collector of Princeton, 3 Zabriskie, 517, and City of Davenport vs. Railroad Company, 12 Iowa, to prove that a tax of the character now under consideration can be collected from resident citizens alone, and both very clearly show that such is the case under the laws of those two States. Neither is decided on any general principle under the Constitution of the United States. Different States enact laws of variant characters. One may consider it highly inexpedient to tax money lent by non-residents to our corporations; others may reason that if such a policy is adopted very soon all of these bonds will be held ostensibly by non-residents, and it be impossible to trace the true ownership, or it may be feared that reciprocal exchanges will be made by the citizens of different States of their respective obligations, and thus the bonds become universally free from taxes. To prove that action under the laws of a State will not bind the citizens of another, we are referred to Baldwin vs. Hale, 1 Wallace S. C. R., 223, where it is held that a discharge under the bankrupt law of Massachu-
37 setts did not bind a citizen of Vermont, which must now be taken as the settled law in that kind of case. But, one cogent reason given is that notice is not sent to citizens of other States, and they should not have their debts discharged without the chance for a hearing. But who ever heard of a hearing being granted before taxes are imposed? The power of the States to pass bankrupt laws in the absence of national action, was long questioned, although it never was doubted that insolvent laws could be enacted for the discharge of the person. It is also contended that this law impairs the obligation of contracts, by taking off a portion of the creditors' claim; but that is, in all cases, a consequence of taxation. It does not enable the debtor to discharge his obligation with a less sum, but requires the corporation to become the collector of the tax for the State, and pay the amount into the public treasury, instead of giving it to the creditor, who would not otherwise pay his taxes. The case of Van Hoffmann vs. The City of Quincy, 4 Wallace, 535, decides nothing having a bearing on this case. It merely establishes that a State cannot impair the obligation of a contract by taking away its means of enforcement, and to permit a law to impair the remedy is substantially annulling the contract itself. We have carefully examined all of the cases cited by the defendant's counsel, none of which in the least degree tend to shake or impair the decision of Maltby vs. The R. and C. Railway Company, which we must take to be a correct exposition of the tax laws of this Commonwealth. We are, therefore, of the opinion that this tax could lawfully be assessed on non-residents, as well as residents of the State. That the officers of this corporation could be and were required to collect the tax, and it was their duty to retain it at the time of paying the interest to their creditors. That the law requiring them to retain and pay it over was a public statute, of which they were bound to take notice, without any

warning from the department, and the corporation defendant is now liable for the amount thereof, with interest at the rate of twelve per cent. from the expiration of thirty days from the time of settlement.

38 To this charge the defendant's counsel did except, and at his request this exception sealed.

JNO. J. PEARSON. [SEAL.]

Defendant also raised the point that the repeal of the tax laws by the act of May 1st, 1868, repealed the laws under which this tax was assessed, and discharged the same; which was overruled by the court, and at defendant's request exception sealed. This made part of the charge.

JNO. J. PEARSON. [SEAL.]

(Endorsed as follows:) Notes and charge of the court filed May 13, 1869. Jos. H. Nissley, proth'y.

39 In the supreme court of Pennsylvania in and for the middle district, ss:

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, plaintiff in error, defendant below,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error, plaintiff below.

In Dauphin common pleas. No. 241, January term, 1868.

Issue writ of error in this case to the court of common pleas of Dauphin County. Returnable the 3d Monday of May next.

J. C. KUNKEL,
J. W. SIMONTON,
Att'ys for Plaintiff in Error.

To WALLACE DE WITT, *Prothonotary.*

DAUPHIN COUNTY, *ss:*

John W. Simonton, attorney for the above-named plaintiff in error, being duly affirmed according to law, says that the writ of error is not intended for delay.

J. W. SIMONTON.

Affirmed and subscribed before me this 28 day of April, 1870.

WALLACE DE WITT, *Proth'y.*

(Endorsed as follows, to wit:) Filed July 7, *July* 7, 1869.

40 In the supreme court of Pennsylvania in and for the middle district, set:

SEAL OF THE SUPREME COURT OF PENNSYLVANIA. The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, greeting:

Because, in the record and process, and in rendering the judgment in a certain plaint which was in our said court, before the judges of the

same court, by our writ, between The Delaware, Lackawanna and Western Railroad Company, plaintiff in error, and the Commonwealth of Pennsylvania, defendant in error, as it is said, manifest error hath intervened to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected, and that speedy justice be done to the parties in this part, do command you that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of the supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 3d Monday of May next, and this writ, that, the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable James Thompson, chief justice of our said supreme court, at Harrisburg, the 7th day of July, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Commonwealth the 92d.

Allowed.

WALLACE DE WITT,
Prothonotary.

The record and process, and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

JOHN J. PEARSON. [L. S.]

(Indorsed:) No. 13, May term, 1870. Supreme court of Pennsylvania, middle district. The Delaware, Lackawanna and Western Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of common pleas for the county of Dauphin. Returnable the 3d Monday of May, 1870. Rule on the defendant in error to appear and plead on the return day of the writ.

"N. B. 20 days' notice to the parties or their counsel below is necessary to compel an appearance.

W. DE WITT, *Proth'y.*

Filed in Dauphin common pleas July 7, 1869.

41 In the supreme court of Pennsylvania in and for the middle district, ss:

At a supreme court of the State of Pennsylvania, in and for the middle district, begun and held at the city of Harrisburg, Penn'a, on the first Monday of May, A. D. 1870, present and presiding the Honorable James Thompson, chief justice of the supreme court of Pennsylvania, John M. Read, Daniel Agnew, George M. Sharswood, justices, and Wallace De Witt, prothonotary—

Among the records of the said supreme court of Pennsylvania in and for said middle district to May term is contained as follows, to wit:

Docket entries.

DELAWARE, LACKAWANNA AND WESTERN Railroad Company, plaintiff in error, defendant below,
vs.
THE COMMONWEALTH OF PENNSYLVANIA, defendant in error, plaintiff below.

Writ of error to court of common pleas of Dauphin Co., Pa., No. 251, January term, 1868, (below;) No. 13, May term, 1870, (above.)

42 Præcipe for writ of error and affidavit filed July 7, 1869.

Writ of error to the court of common pleas of Dauphin County issued July 7, 1869.

Assignments of error filed by plaintiff in error May 16, 1870.

Writ of error returned with record from the court of common pleas of Dauphin County, and filed May 16, 1870.

Called for argument and argued May 21, 1870.

And now, to wit, July 7th, 1870, this cause came on to be heard: and, on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law.

Per curiam.

THOMPSON, *C. J.*

Petition for writ of error to the Supreme Court of the United
43–44 States. Citation to defendant in error. Writ of error from the Supreme Court of the United States, allowed by W. Strong, justice of the Supreme Court of the United States, and bond in the penal sum of forty-five thousand dollars, approved by W. Strong, justice of the Supreme Court of the United States, received and filed July 16, 1870. Same day, a copy of writ of error for the defendant in error, to wit, The Commonwealth of Pennsylvania, received.

July 28, 1870. Service of citation accepted by attorney general of Pennsylvania, Hon. F. Carroll Brewster, and same day copy of writ of error received by him.

SEAL OF THE SUPREME COURT OF PA., MID. DIST.

Certified from the record.
WALLACE DE WITT,
Prothonotary.

45 *Assignments of error.—Specifications of errors.*

1. The court erred in charging the jury as follows:

"The first question presented is, are these mortgages and the money they secure taxable and taxed under our laws? They are certainly embraced within the words of the 32nd section of the act of April 29, 1844, although we might infer that it was the legislative intention to have the tax assessed against the holder of the mortgage or debt, in the ordinary method of assessing taxes, especially as the same obligations were made taxable for county, township and school purposes, by various laws. The act of May 1st, 1854, shows clearly the intention to assess these obligations for State purposes only, and they are exonerated from all other taxes. Although we may fairly infer the legislative intention to impose this tax for State purposes, yet no method was de-

vised of ascertaining or collecting the amount until the act of April 30, 1864, was passed, the third section of which required a full return of all corporation indebtedness to be made to the auditor general, and the tax to be retained for the use of the State, by the corporation officers, who paid the interest."

2. The court erred in charging the jury as follows:

"That the tax now in controversy is valid and binding, both on the corporation and its creditor, is clearly settled in Maltby vs. The Philadelphia and Reading Railroad Company, 2 P. F. Smith, 140, and that, too, whether the creditor resides in Pennsylvania or elsewhere. The non-resident can be taxed for the protection which his debt receives from our laws by granting and securing the franchises of the company to which he has entrusted his money."

3. The court erred in charging the jury as follows:

46 "It is also contended that this law impairs the obligation of contracts, by taking off a portion of the creditor's claim; but that is, in all cases, a consequence of taxation. It does not enable the debtor to discharge his obligation with a less sum, but requires the corporation to become the collector of the tax for the State, and pay the amount into the public treasury, instead of giving it to the creditor, who would not otherwise pay his taxes."

4. The court erred in charging the jury as follows:

"That the officers of this corporation could be and were required to collect the tax, and it was their duty to retain it at the time of paying the interest to their creditors. That the law requiring them to retain and pay it over was a public statute, of which they were bound to take notice, without any warning from the department."

5. The court erred in charging the jury that the corporation defendant, was liable for the whole amount claimed, as follows:

"The corporation defendant, is now liable for the amount thereof, with interest at the rate of twelve per cent. from the expiration of thirty days from the time of settlement."

6. The court erred in charging the jury as follows:

"Defendant also raised the point that the repeal of the tax laws by the act of May 1st, 1868, repealed the laws under which this tax was assessed, and discharged the same, which was overruled by the court."

7. The court erred in directing the jury to find a verdict against defendant, with twelve per cent. interest, instead of six per cent. as allowed by law when this account was settled.

(Endorsed as follows, to wit:) Filed May 16, 1870. Wallace De Witt, prothonotary.

Judgment entered July 7, 1870, as follows, to wit:

And now, to wit, July 7, 1870, this cause came on to be heard; and, on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of the opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law.

Per curiam.

THOMPSON, *C. J.*

47 And now here, to wit, July 16, 1870, the said The Delaware, Lackawanna and Western Railroad Company produced to the said supreme court of Pennsylvania here, the writ of the *of the* United States of America for the correcting of errors of and upon the premises,

commanding the record and proceedings aforesaid, of the judgment aforesaid, so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington, on the first Monday of December next; which writ of error is in the words and of the tenor following, to wit:

48 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

The President of the United States to the judges of the supreme court of the State of Pennsylvania, the highest court of law or equity in the said State, greeting:

Because that in the record and process, and also in the rendering of judgment in a suit before you, between The Delaware, Lackawanna and Western Railroad Company, a corporation of the State of Pennsylvania, plaintiff in error, and The State of Pennsylvania, defendant in error, (No. 13 of the May term, 1870, of the middle district of Pennsylvania,) in which said suit the validity of a statute of the State of Pennsylvania, on the ground of repugnancy to the Constitution of the United States, is said to have been drawn in question, and the decision to have been in favor of the said statute, a manifest error has intervened to the great damage of the said plaintiff in error, as in their complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf:

You are hereby commanded that if judgment thereof be given, then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them, to the Supreme Court of the United States, together with this writ, so
49 that you have the same at Washington, on the first Monday of December next, in the Supreme Court to be then and there held, that, the record and process aforesaid being inspected, the said Supreme Court may cause to be done therein, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this sixteenth day of July, A. D. one thousand eight hundred seventy, and in the ninety-fifth year of the independence of the said United States.

[SEAL.]

JOHN B. BEAVER,
Pro. Clerk Cir. C't U. S.

Allowed July 16, 1870.

W. STRONG,
Ass. Jus. Sup. C., U. S.

50 In pursuance whereof and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things touching and relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

51 In the supreme court of Pennsylvania in and for the middle district, ss:

Know all men by these presents that we, The Delaware, Lackawanna and Western Railroad Company, and Moses Taylor and George Bliss,

are held and firmly bound unto The Commonwealth of Pennsylvania in the sum of forty-five thousand dollars, to be paid to the said Commonwealth, its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves and each of us and each of our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seal, and dated this 12 day of July, A. D. 1870.

The condition of this obligation is such, that whereas the said Commonwealth of Pennsylvania has recovered a judgment in the supreme court of the State of Pennsylvania in and for the middle district against the said The Delaware, Lackawanna and Western Railroad Company for the sum of $22,558 05 *dollars* and costs, which said judgment was rendered on the 7th day of July, A. D. 1870; and whereas the said The Delaware, Lackawanna and Western Railroad Company, in order to obtain a reversal of the same, have sued out a writ of error to the Supreme Court of the United States: Now, therefore, if the above-named The Delaware, Lackawanna and Western Railroad Company shall prosecute their said writ with effect, and shall answer all costs and dam-
52 ages and pay the said judgment if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

{ SEAL OF THE D., L. & W. R. R. CO. } Delaware, Lackawanna and Western Railroad Company.

By SAMUEL SLOAN,
President.
MOSES TAYLOR.
GEORGE BLISS.

Executed and delivered in presence of—
A. J. ODELL.

(Endorsed as follows:) The Delaware, Lackawanna and Western R. R. Co., plaintiff in error, vs. The State of Pennsylvania, defendant in error. U. S. Supreme Court. Bond. Bond and sureties approved, W. Strong, J., July 16, 1870. Filed in the office of the prothonotary of the supreme court of Pennsylvania in and for the middle district, July 16, 1870. Wallace De Witt, prothonotary.

53 The United States of America to the State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the first Monday of December next, pursuant to a writ of error issued from the Supreme Court of the United States to the supreme court of Pennsylvania, wherein The Delaware, Lackawanna and Western Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff, viz., in a suit, No. 13, of the May term, 1870, (middle district,) of the said supreme court of Pennsylvania, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Strong, one of the associate judges of the Supreme Court of the United States, this sixteenth day of July, A. D. 1870.

W. STRONG.

I accept service for defendant in error.

F. CARROLL BREWSTER,
Attorney General of Penn'a.

JULY 28, 1870.

(Indorsed:) U. S. Supreme Court. The Delaware, Lackawanna and Western Railroad Co., plaintiff in error, vs. The State of Pennsylvania, def't in error. Citation. Filed in the office of prothonotary of the supreme court of Pennsylvania in and for the middle district. July 16, 1870.

WALLACE DE WITT,
Prothonotary.

54 In testimony that the aforegoing, pages from one to 53, (53,) inclusive, is a true and correct copy and correct transcript taken from the record and all proceedings of the supreme court of Pennsylvania, the highest court of law or equity in the State of Pennsylvania, in the case of The Delaware, Lackawanna and Western Railroad Company, plaintiff in error, vs. The Commonwealth of Pennsylvania, defendant in error, No. 13, May term, A. D. 1870, and all papers filed and attached to said record, I have hereunto subscribed my name and the seal of the said supreme court affixed this 29 day of October, A. D. 1870.

[SEAL.] WALLACE DE WITT,
Prothonotary of the Supreme Court of Pennsylvania for the Middle District.

55 Supreme Court of the United States. In error of December term, A. D. 1870.

THE DELAWARE, LACKAWANA AND WESTERN Railroad Company
v.
THE COMMONWEALTH OF PENNSYLVANIA.

Afterwards, to wit, on the day of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The Delaware, Lackawanna and Western Railroad Company, by J. W. Simonton, its attorney, and says that, in the record and proceedings aforesaid, there is manifest error in this, to wit, that the declaration aforesaid and the matters therein contained are not sufficient in law for the said The Commonwealth of Pennsylvania to have or maintain its aforesaid action thereof against the said The Delaware, Lackawanna and Western Railroad Company; that there is also error in this, to wit, that, by the record aforesaid, it appears that the judgment aforesaid given was given for the said The Commonwealth of Pennsylvania against the said The Delaware, Lackawanna & Western Railroad Company, whereas by the law of the land and the Constitution of the United States the said judgment ought to have been given for the said The Delaware,

55½ Lackawanna and Western Railroad Company against the said The Commonwealth of Pennsylvania; and the said The Delaware, Lackawanna and Western Railroad Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of said judgment. And it will pray, &c.

J. W. SIMONTON,
Attorney for Pl'ff in Error.

(Indorsed:) Supreme Court of the United States of December term, A D. 1870. No. 408. The Delaware Lackawanna and Western Railroad Company v. The Commonwealth of Pennsylvania. Assignment of error. Filed 14th December, 1870.

(Indorsement on cover:) No. 408. The Delaware, Lackawanna and Western Railroad Company, plaintiff in error, vs. The State of Pennsylvania. Pennsylvania sup. court. Filed 14th December, 1870.

O

Supreme Court of the United States.

NO. 408 DECEMBER TERM, 1870.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Brief on behalf of the Plaintiff in Error.

BY

J. W. SIMONTON,
Counsel.

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

In Error to the Supreme Court of the State of Pennsylvania.

BRIEF OF ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

This case is brought here by a writ of error directed to the Supreme Court of the State of Pennsylvania, which is the highest court of law in the State, to bring up for review a judgment of that court, affirming the validity of a statute of Pennsylvania which was alleged to be repugnant to the Constitution of the United States.

It arose out of a claim, by the State of Pennsylvania, to tax, in the hands of non-residents, citizens of other States, the interest on bonds owing by the corporation plaintiff in error, to such non-residents, and to collect such tax, by requiring the officers of the debtor corporation to retain part of the interest due to such non-residents, and to pay it over to the State. This, the plaintiff in error contended, could not be done, because it would impair the obligation of the contract between the corporation and its non-resident creditors.

The facts of the case have been fully and clearly stated, and the assignment of errors, required by the recent rules of this court, have been made, in the brief of our learned Colleague in this case, and it is not necessary to repeat them at length here. We will, however, for convenience of refer-

ence, give the acts of the Legislature of the State of Pennsylvania, on which the alleged right, to impose the tax in question, is founded.

The statute which gave rise to the present controversy was passed April 30, 1864, and is entitled "An Act imposing additional taxes for State purposes and to abolish the revenue board." It will be found at page 218 of the pamphlet laws of Pennsylvania for 1864, and in Brightly's Purdon's Digest, p. 1378, *et seq.*, pl. 2-8. Its third section, which is the only one material to this case, is as follows:

"Every president, treasurer, cashier, or other officer of any company incorporated, or that may hereafter be incorporated, which pays interest to its depositors, bondholders, or other creditors, upon which by the laws of the Commonwealth a State tax is imposed, shall, before payment of the same, retain from said depositors, bondholders, or other creditors, the amount of State tax imposed by existing laws, and shall pay over the same to the State Treasurer, and that all the laws regulating the mode of such payment in regard to treasurers of counties, cities and boroughs be, and the same are, extended to the financial officers thereof; and they are hereby required to collect and pay over the taxes due to the State on such payments of interest as provided in this section to be done by officers of incorporated companies; and in case of any officer neglecting or refusing to retain the same, he shall become personally liable for the amount."

It will be observed that this section does not *impose* a tax, but merely provides a method of *collecting* one already *imposed;* and, to understand its full scope and operation, reference must be made to the following sections of acts of Assembly of the State of Pennsylvania which were in force when the act of April 30, 1864, was passed:

"All real estate, to wit, houses, lands, lots of ground, ground-rents, mills, and manufactories of all kinds; furnaces, forges, bloomeries, distilleries, sugar-houses, malt houses, breweries, tan-yards, fisheries and ferries, wharves, and all other real estate not exempt by law from taxation; also, all personal estate, to wit, horses, mares, geldings, mules, and neat cattle over the age of four years; *also, all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment;* also, all articles of agreement, and accounts bearing interest, owned or possessed by any person or persons whatever, except notes or bills for work or labor done and bank notes; also, all shares or stock in any bank, institution or company now or hereafter incorporated by or in pursuance of any law of this Commonwealth, or any other State or government, and on all shares of stock or weekly deposits in any unincorporated saving fund institution, and all public loans or stocks whatsoever, except those issued by this Commonwealth, and all money loaned or invested on interest in any other State," &c., &c.— * * * * "shall be valued and assessed

for taxation for the purposes in this act mentioned, and for all State and county purposes whatsoever." Act of April 29, 1844, section 32, Brightly's Purdon, p. 949, pl. 497.

"The county commissioners of each and every county in this Commonwealth shall be, and they are hereby required annually, at the time of making county rates and levies, to assess for the use of the Commonwealth upon" (the various subjects of taxation enumerated;) "and upon all other property heretofore made taxable for State purposes, or that are made so by the 32d section of this act, three mills on every dollar of the value thereof." Same act, section 34; Brightly's Purdon, p. 950, P. L. 1844, p. 499.

(By the 86th section of the act of May 18th, 1857, P. L., 571, the tax of three mills was reduced to two and a half mills; but by the 6th section of the act of May 16th, 1861, P. L., p. 767, an addition of one-half mill to the two and half mills was made.)

Under these acts the Supreme Court of the State of Pennsylvania held (in the case of Maltby *vs.* The Reading and Columbia Railroad Company, 2 P. F. S., 140) that either "money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment," or "all public loans or stocks whatsoever, except those issued by the Commonwealth,"—both of which are enumerated as subjects of taxation in the act of April 29th, 1844,—included the bonds of a Pennsylvania corporation, whether held by citizens of Pennsylvania or by citizens and residents of another State or of a foreign country, and that such bonds were taxable as the property of the holders at the rate of three mills on every dollar of the value thereof. As reference is made—as well in the opinion of the court in Maltby's case as in the opinion of the court before which the present case was originally heard (see printed record, p. 13)—to an act of May 1st, 1854, that act is here inserted so that the court may have before it all the Pennsylvania legislation in reference to the taxability of the money due from corporations to the holders of their bonds.

"AN ACT

"To exempt certain loans and bonds from taxation.

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same*, That all certificates of loan now issued, or which may be hereafter issued, by the city of Philadelphia or any of the incorporated districts of the county of Philadelphia, in payment of subscriptions already made or which may be hereafter made by the municipal authorities of said city or incorporated districts to the capital stock of any railroad company, and all bonds or certificates of loan of any railroad company incorporated by this Commonwealth, be and the same

shall be liable to taxation for State purposes only." Pamphlet laws of 1854, p. 535.

This act—although evidently intended not to impose, but to remove, a tax—must be considered as recognizing the previous taxability of the bonds or certificates of loan to which it refers, for county, and other local purposes, when held by residents of the State.

These laws being in force, the Auditor General and State Treasurer of Pennsylvania, settled an account, on the 18th of November, 1867, against the corporation plaintiff in error, charging it, under the act of April 30, 1864, with a tax of $18,477 16 on account of interest paid on its bonds.

The company having appealed from this settlement to the Court of Common Pleas of Dauphin county, the Commonwealth of Pennsylvania, according to the practice in such cases, filed a declaration in that court on the stated or settled account, to which the railroad company pleaded "*nil debet*," (see printed record, pp. 3 and 4,) and the issue thus formed was tried in said Court, before the president judge, Hon. John J. Pearson, and a jury.

It appeared, from the evidence, that the outstanding bonds of the company, during the period included in the settlement, varied in amount from an average of $3,476,500 in 1864 to an average of $3,390,500 in 1866; that they were payable, both as to principal and interest, in the city of New York; that the interest was the New York rate, seven per cent., and that the bonds were principally held by persons who were neither citizens nor residents of the State of Pennsylvania. The treasurer of the company, whose office was in the city of New York, proved that not less than $2,000,000 of the bonds were so held, including all the bonds registered in the registry in his possession, and that, as to the unregistered bonds, he had no knowledge, personal or otherwise, that any portion was held or owned by, or owing to, persons resident in the State of Pennsylvania.—(See printed record, pages 5, 10, 11 and 12.) There was no direct evidence that any of the bonds were, in fact, held by citizens or residents of Pennsylvania.

It also appeared in evidence that the several issues of bonds, which made up the aggregate of the funded indebtedness of the company, were secured by mortgages on the railroad and coal lands of the company in the State of Pennsylvania.

The learned president of the Common Pleas, following the decision of the Supreme Court of Pennsylvania, in Maltby vs. The Railroad Company, instructed the jury "that the statutes of Pennsylvania, brought in question" and cited above, "did not, when applied to the facts and circumstances of this case, impair the obligation of the contract between the non-resident bondholders and the corporation, plaintiff in error, but were in all respects

constitutional and valid," and "that the defendants were liable for the whole amount of tax claimed, with interest at the rate of twelve per cent., from the expiration of three months from the date of the settlement."

The jury rendered a verdict for the plaintiff—the Commonwealth—in the sum of $21,588 05, on which judgment was afterwards entered; this judgment was removed to the Supreme Court of Pennsylvania, the highest court of law in the State, by writ of error, where the instructions of the learned judge of the court below, above cited, were, *inter alia*, assigned as errors.

The judgment of the Court of Common Pleas was affirmed in the Supreme Court, the entry of the judgment of affirmance being as follows: "And now, to wit: July 7, 1870, this cause came on to be heard, and, on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of the opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law," whereupon the cause was brought unto this court by writ of error, and this judgment of affirmance, and the sustaining, by said Supreme Court, of the rulings of the Court of Common Pleas, have been assigned for error, as above stated.

Believing that there is error in the judgment of the Supreme Court of Pennsylvania, and that the act in question, as construed and applied, is repugnant to the Constitution of the United States, we contend that its judgment should be reversed:

FIRST.—*Because, the said act of the Legislature of Pennsylvania, as applied to the facts and circumstances of this case, is unconstitutional and void, in that it impairs the obligation of the contract between the non-resident bondholder and the corporation plaintiff in error.*

It was said by Mr. Justice Nelson, in delivering the opinion of the court in the case of The Railway Company vs. Jackson, 7 Wallace, 262, "The tax upon the promissory note or bond given by the resident debtor, and the withholding of the amount from the interest due to the non-resident, would seem to be a tax upon such non-resident. It is not a tax of the money lent, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond, which is in the hands of the non-resident holder."

This is shown to be so by the very terms of the law under which the tax is claimed. It provides, that "every president, treasurer, cashier, or other officer of any company incorporated, or that may hereafter be incorporated, which pays interest to its depositors, bondholders or other creditors, upon which, by the laws of the Commonwealth, a State tax is imposed, *shall, before payment of the same, retain from said depositors, bondholders or other creditors, the amount of State tax imposed by existing laws*, and shall pay over the same to the State Treasurer."

And it has been so construed by the Supreme Court of Pennsylvania, in Clopton vs. The Philadelphia and Reading Railroad Company, 4 P. F. Smith—54 Penn'a State R.—356.

The tax being, then, a charge upon the holder of the bond, and exacted in respect of the bond held by him, the question is: Has the State of Pennsylvania a right to impose it upon non-residents of the State, who are and became holders of the bonds of the plaintiff in error, at the time and in the manner detailed in the statement of the facts in this case.

We think this question should be answered in the negative.

We do not doubt the power or right of the State to impose such taxes as she may see fit upon all railroads or parts of railroads which lie within her borders, or upon the franchises of all railroad companies chartered by the State, by any general law which shall apply alike to all according to their value.

The question is not one of the right or power of the State to raise such revenue as she may need from the railroad property or franchises within her limits; no one doubts that she can do this, and neither her right or her power so to do would be affected by a reversal of the judgment in this case.

But it is a question of her power and her right to levy a contribution or tax upon the contracts or choses in action of citizens of other States, by requiring the officers of the debtor corporation to withhold a part of the interest stipulated to be paid to such citizens of other States, and to pay the same into the Treasury of the State.

This we contend she cannot do upon any legal principle of taxation, and the law if so construed and applied would impair the obligation of the contract between the railroad company and such citizens and residents of other States, and is therefore repugnant to the Constitution of the United States and null and void.

The import of the terms "obligation of a contract" has been thus defined and illustrated by this court: "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence, any law, which in its operation, amounts to a denial or obstruction of the rights accruing by a contract, * * * is directly obnoxious to the prohibition of the Constitution." M'Cracken vs. Hayward, 2 How., 612.

And Judge Story has said, "It is the civil obligation of contracts which it (the Constitution) is designed to reach; that is, the obligation which is recognized by, and results from the law of the State in which it is made. * * * * When it does not fall within the predicament of being either illegal or void, its obligatory force is co-extensive with its stipulations." Story on Const, § 1374.

Woodward, C. J., in Maltby vs. the Reading and Columbia Railroad Company, after suggesting that the question, "how far modern tax laws shall be permitted to impair and alter private contracts is a great question, which must be decided ultimately by the Supreme Court of the United States," adds: "Perhaps the sound conclusion is that governmental taxation, a thing always to be anticipated when contracts are made, does not impair the obligation of contracts within the meaning of the constitutional inhibition."

This we believe to be the "sound conclusion" where both parties to the contract are within the jurisdiction of the taxing power. The case put by the Chief Justice, that "a section of the excise law of 1864 authorized manufacturers who had existing contracts for the delivery of manufactured goods at the date of the law, to add the increased duties to the contract price, and collect them from the vendee, and this is now done," is not, we think, open to objection, as he seems to intimate; because both the vendor and the vendee being within the jurisdiction of the United States, it did not impair the obligation of the contract, but only added to it the duty, on the part of the vendor, to act as collector of the excise tax, and on the part of the vendee to pay it. The United States had a clear right and power to tax him, and the manner in which they did it was a matter of indifference. This is clearly pointed out and made the ground of the decision in Haight vs. Railroad Company, 6 Wallace, 15. Besides, the United States are not prohibited from passing laws impairing the obligation of contracts. This prohibition applies only to the States.

But when the contract is made, and is to be executed, out of the jurisdiction of the power claiming the right to tax, and the party to the contract whose interest in it is sought to be taxed, resides without the jurisdiction, and does not need to ask the aid of the State courts to enforce his contract, we submit that this principle does not apply, and that the obligation of such a contract is as much protected by the Constitution from being impaired by taxation as in any other way.

The provision of the Constitution of the United States is, that "no State shall pass *any* law impairing the obligation of contracts," and as has been said—Sedgwick on Stat. and Const. Law, p. 169:

"The clause in the Constitution referring to all contracts without exception, and it being settled that this includes executory as well as executed

contracts, no difficulty seems to have presented itself in relation to the true construction of the clause in regard to agreements of a private character."

"All private contracts, in the ordinary legal application of that phrase, are understood to be embraced by it. If an agreement is such that if executory it can be enforced in a court of justice, or that if executed a remedy can be sought for its violation or infringement, then it is a contract to be protected, within the meaning of the constitutional clause."

And defining and illustrating the sense in which the term *impairing* the obligation of a contract is used in the Constitution, Judge Story says: "It is perfectly clear that any law which enlarges, abridges, or in any manner changes the intention of the parties, resulting from the stipulations in the contract, necessarily impairs it. The manner or degree in which this change is effected, can in no respect influence the conclusion; for whether the law affect the validity, the construction, the duration, the discharge or the evidence of the contract, it impairs its obligation, though it may not do so to the same extent in all the supposed cases. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes; imposing conditions not expressed in the contract, or dispensing with the performance of those which are a part of the contract, however minute or apparently immaterial in their effect upon it, impairs its obligation. *A fortiori*, a law which makes the contract wholly invalid, or extinguishes, or releases it, is a law impairing it." 3 Story on Const. § 1379.

A tax law, therefore, which does actually impair the obligation of a contract is as certainly prohibited by this provision as any other law, and the only question in any given case, is, was the party whose rights under a contract are affected by a tax law, so situated with relation to the law making power, that he was bound to contract with reference to the existence or passage of such a law?

The principle we believe to be this: All citizens of any given State, in entering into contracts to be performed within such State, are bound to have regard to the laws of the State, then in force, which relate to or bear upon the subject; as well as to the fact that there are certain classes of laws, such as tax laws and police laws, which may be constitutionally applied to prior contracts; but a citizen of one State, entering into a contract lawful in his own State, which is to be performed there, is not bound in contracting, to have any reference to the laws of another State, present or future, whether they be tax laws or laws of any other kind.

An illustration of this principle is given in the effect of State insolvent laws. Thus, citizens of a given State, entering into a contract to be performed in such State, are bound by the fact of the existence of an insolvent law; but one who is a citizen of another State, even though contracting in the State where such law exists, with one of its citizens, is not bound to

have any regard to such law and his rights cannot be effected by it, owing to the clause in the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts. The State law has no jurisdiction over him, and his contract is not affected by it, because he is not a citizen of such State.—Ogden *vs.* Sanders, 12 Wheat., 213. Baldwin *vs.* Hale, 1 Wallace, 223. Story, Conflict of laws, (4 ed.,) sec. 341.

Judge Story says: "Under the peculiar structure of the Constitution of the United States, prohibiting the States from passing laws impairing the obligation of contracts, it has been decided that a discharge under insolvent laws of the State where the contract was made, will not operate as a discharge of the contract, unless it was made between citizens of the same State; it cannot, therefore, discharge a contract made with a citizen of another State."

He also lays it down as a maxim—Conflict of Laws, section 20—"That no State or nation can by its laws directly affect or bind property out of its own territory, or bind persons not residents therein, whether they are natural born subjects or others." And see sections 17, 18 and 19.

This tax law does attempt to bind and affect both persons and property out of its jurisdiction.

It is not, as we have already seen, a tax upon the railroad company, nor is it a tax upon their property, nor measured by its value. The value of the property of a given company has nothing to do with the amount of the tax to be collected by it from the bond-holders.

It is only when viewed in relation to the contract of the bondholder that the properties of a tax can be ascribed to this levy. It is laid rateably upon the value of his contract, this value being determined by what it yields him. If then it is a tax at all, it is a tax upon his contract, upon its value, its proceeds.

The law then is aimed directly at the contract, and in effect, as well as in terms, it says to the debtor, "you shall not perform your contract according to its stipulations," and to the bondholder, "you shall receive a part only, and not the whole of that for which you contracted."

This would be unobjectionable, for the reason already stated, if both parties to the contract were within the jurisdiction, for it would be all the same, in fact and in principle, to retain it from the creditor, as to collect it from him after it was paid to him, and in either case he would receive credit for its payment—Haight *vs.* Railroad Company, above cited. The objection arises because of preventing him from receiving his stipulated interest, when if he did receive it, there would confessedly be neither right nor power to collect it from him as a tax.

The law could not be enforced directly against the bondholder, because he is not within the jurisdiction, nor against his property, for neither is it within the jurisdiction; hence there is no penalty imposed upon him for failing to comply with the law, nor any attempt at, or provision for, enforcing it against him, or against his property. But the debtor, being within the jurisdiction and power of the law, is required, on pain of having to pay the tax himself, with a penalty added, to violate his contract with the bondholder and force him to take a part of the interest due him in full satisfaction of the whole. This we contend is "impairing the obligation of the contract," between the company and the bondholder, and taxing persons and things beyond the jurisdiction of the State.

We claim, in short, that the bondholder, residing and contracting out of the State, and the place where the contract is to be performed being without the State, and being able to enforce his contract in the courts of the United States, without appealing to the courts of the State, can neither be expected nor required to anticipate or refer to tax laws of this State, when making his contract, and that therefore the principle stated by C. J. Woodward, which is undoubtedly sound when applied to citizens of the State, does not apply to him, and this tax law, which attempts to force him to accept part performance of his contract in lieu of full performance, would, if carried into effect, impair the obligation of his contract within the meaning of the constitutional inhibition, and is therefore, as to him, null and void.

But it is said that though the bondholder is beyond the jurisdiction of the State, his property is within it, and indeed, this is the principal ground upon which the decision in the case of Maltby *vs.* the Reading Railroad Company is put by the court. They say "there must be jurisdiction over either the property or person of the owner, else the power cannot be exercised; but where the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides elsewhere."

We think this position rests upon a confusion of ideas and a confounding of things which are, in their nature, entirely distinct and separate, and that there is no proper sense in which the non-resident bondholder, as such, can be said to have any property within the State.

He does not own the property or the franchises of the corporation debtor, nor anything that has an actual *situs* within the State. The property mortgaged belongs entirely to the debtor, who has complete control over it, and it seems to us to involve a contradiction in terms, to speak of it as belonging in any sense to the non-resident creditor.

It is certainly as well settled as anything can be, in Pennsylvania, whatever the doctrine may be elsewhere, that a mortgage is only a lien or en-

cumbrance on the land mortgaged, and that the mortgagee has no estate in the land. Thus, in Wilson *vs.* Shoenberger's executors, 7 Casey, 299, it is said by Woodward, J.: "It is the settled law of the Pennsylvania mortgage that though in form a conveyance of title, it is in reality, both at law and in equity, only a security for the payment of money or performance of other collateral contract." And in Edmondson *vs.* Nicholson, 10 Harris, 79, Lewis, J., says: "The mortgagee has no estate in the land. His mortgage is nothing but a security for a debt. It is only an incumbrance." So in Witmer's Appeal, 9 Wright, 463, it is said: "A mortgagee has no estate in the land, any more than a judgment creditor. Both have liens upon it, and no more than liens. This was expressly asserted in Assay *vs.* Hoover, 5 Barr, 35, and has been substantially, if not expressly, affirmed in many cases. Rickert *vs.* Maderia, 1 Rawle, 228; Edmondson *vs.* Nicholson, 10 Harris ,79; Wilson *vs.* Shoenberger's executors, 7 Casey, 299."

And although in Pennsylvania all possible contingent titles to land, accompanied with an estate, property, or real interest in the land, are subject to levy and sale on execution; Humphreys *vs.* Humphreys, 1 Yeates, 429; Sharpe *vs.* Sharpe, 12 Sargeant & Rawle, 12; Streaper *vs.* Fisher, 1 Rawle, 162; it has been settled, on the principle of want of interest or estate in the mortgagee, that the mortgaged premises cannot be taken in execution for his debt.—Rickert *vs.* Maderia, 1 Rawle, 329.

In the latter case, the court say, "a mortgage must be considered either as a *chose in action*, or as giving title to the land, and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower, and to the lien of a judgment. The same objections which may be urged against one judgment being a lien on another judgment, will apply with equal force to the doctrine that a judgment is a lien on a mortgage. That a mortgage is but a *chose in action*, a mere evidence of debt, is apparent from the whole current of decisions."—p. 328.

This being the nature of the mortgage, it surely cannot be said that the non-resident holder and owner of a bond secured by mortgage in Pennsylvania owns any real estate there.

Does he, then, own any personal property within the State? He does not own the money lent, for that, as has been truly said by Mr. Justice Nelson, in Jackson *vs.* the Railroad Company, "belongs to the resident debtor, for which he is taxable." If, then, he owns neither the land bound nor the money lent, but merely the bond and mortgage, the choses in action which follow the person of the owner, and are actually in his possession without the State, we submit that he owns nothing within the jurisdiction of the

State. Neither does he need, as has been argued, to invoke the aid of the courts of the State to reap the fruits of his security in case of the non-payment of the interest or principal of the bonds. The courts of the United States have ample jurisdiction and power to give the non-resident bondholder all the judicial aid he may need.

These considerations have led the courts of those States where this question has been raised, to decide in favor of the position taken by the plaintiff in error. Thus, in State of Nevada *vs.* Earle, 1 Nevada State Reports, 397, it is decided that the State, under a statute imposing a tax, *inter alia*, on "money at interest, secured by mortgage," could not tax mortgages or bonds belonging to persons not citizens nor residents of the State, though the mortgages were a lien on lands within the State. The court say:

"The tax, however, upon money at interest secured by mortgage, is, in the opinion of this court, neither a tax on coin, which is taxed as tangible personal property, a tax on the land mortgaged, which is taxed at its value, without regard to the mortgage, nor a tax on the piece or pieces of paper upon which the note and mortgage are written, but it is a tax on a *chose in action;* in other words, it is a tax on the right which a party has to receive or collect a certain amount of money. *Choses in action* are intangible, and have no locality separate from the person possessing the power to enforce the right."

"All *choses in action* follow the person of the owner. No doubt the State may tax such rights when held by its citizens, but if a party lives in another State, this State has no jurisdiction or control over the person of such non-resident, and none over the *chose in action*, because it has no location or tangibility in this State. The same debt might be secured by separate and distinct mortgages in twenty States at the same time. If the recordation then of a mortgage in this State would fix the *situs* of the *chose in action* here, the recordation of other mortgages would fix it in nineteen other States at the same time, and each State would have a right to tax this same *chose in action* within its own borders, thus levying twenty annual taxes on the same property within the same year, which would be a manifest absurdity."

"The State can only tax such *choses in action* as belong to its own citizens or residents."

And in the case of the city of Davenport *vs.* The Mississippi and Missouri Railroad Company, 12 Iowa Reports, 539, the court held that mortgages owned by non-residents of the State could not be taxed within it.

The court say:

"The counsel in their argument say that it is not the defendants that they seek to tax, but it is the thing in their possession. If the mortgages

are property in the possession of the defendants, the tax under the section referred to should be assessed in the name of the owner of the "thing" made subject to the taxation. We cannot concede, however, that it was the intention of the Legislature to tax mortgages when owned by non-residents of the State. Section three of said act provides that all property real and personal *within this State* is subject to taxation, &c., and mortgages and other securities are within the classes of property named. Is a mortgage, owned by a non-resident, property within this State, within the meaning of this section? A mortgage, so long as the right of redemption continues, is personal estate. Both in law and equity the mortgagee has only a chattel interest.—See Williard on Mortgages, vol. 1, page 163.—It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but the mortgage itself being personal property, a chose in action, attaches to the person of the owner.—See Story Confl. of Laws, section 379.—It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mort gage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation."

"In Angell & Ames on Corporations, section 458, it is said: 'The general rule appears clearly to be that in regard to public taxes every person is liable to be assessed for his personal property in the State of which he is an inhabitant; and stock owned in incorporated banks, &c., by non-resident holders thereof, is not subject to the taxing power of the State. Indeed, the stock is not a thing in itself capable of being taxed on account of its locality; and any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner, who, if he be a non-resident, is beyond the jurisdiction of the State, and not subject to its laws.'"

"In the case of the State (James Potter, prosecutor,) *vs.* Robert Ross, collector, &c., 3 Zabr., 517, in which the prosecutor, who was a citizen of Georgia, was residing temporarily in the State of New Jersey, and was the owner of a large amount of bonds of the Camden and Amboy railroad, which he had with his person,—the defendant, as collector, had levied a tax upon the prosecutor, under a law which enacted that all personal property within the State should be liable to taxation, and specified debts due from solvent debtors within or without the State."

"The Chief Justice, in his opinion, held that the law applied exclusively to the inhabitants of the State of New Jersey, and his reasoning in support of this opinion is substantially as follows:"

"1. Because every law must be presumed to primarily apply, when not otherwise clearly expressed, to the citizens of that State or the subjects of

that government by which the law is enacted, and not to the citizens of other States or subjects of other governments."

"2. Because to hold otherwise would necessarily impose the burden of double taxation. 'It cannot be presumed,' says the Chief Justice, 'in the absence of clear and explicit enactment, that the Legislature designed to weaken the bonds of the Union by discouraging commercial intercourse between the citizens of our own and our sister States. The fair and reasonable presumption is that they designed to adopt a general principle, just and beneficial in its operations, viz: to make all property in action taxable at the domicil of its owner, and to apply the same principle to the citizens of our own and all other States."

And in the case of the State *vs.* Ross—cited above—it is further said:

"By the law under consideration, the Legislature have declared that all the property in action of every citizen of this State, wherever it may be situate, shall be liable to taxation. They have enacted that debts due from foreign debtors and stocks in corporations in other States, and all property in action, owned by citizens of this State, shall be taxed to the owner thereof. They have legislated upon the principle that property in action, having no visible locality, should follow the domicil of the owner, and be subject to taxation there. Adopting this principle in regard to their own citizens, it is not probable that the Legislature designed to repudiate it in regard to the citizens of other States. Such a course of legislation, besides its tendency to provoke retaliatory legislation by other governments, would operate unjustly and oppressively upon every individual living in one State, and owning property in another, by subjecting him to double taxation. If a law be enacted in Georgia precisely similar to our own, it is certain that the prosecutor would be liable to taxation for his property as a citizen of that State, and if it be held liable to taxation in this State also, it must necessarily bear the burthen of double taxation; and on the other hand, under such a system of legislation, property owned in Georgia, by a citizen of this State, would be liable to the same burthen of double taxation."

So in People vs. Eastman, 25 California reports, 603; The court say: "This is an action to recover a tax levied in the county of Mariposa, under the revenue act of 1861, for the fiscal year 1863–64. At the time the tax was levied, the defendant was, and he ever since has been a resident of the city and county of San Francisco. The property taxed was a judgment of record in Mariposa county, foreclosing a mortgage held by defendant on lands situate in said county. The defendant had judgment, and plaintiff appeals."

"The question is, as to whether the judgment is properly taxable in Mariposa county. We think not. In the case of The People vs. Park, 23 Cal. 138, the property assessed was a mortgage upon lands in Mariposa county,

held by a resident in San Francisco. In that case the tax was assessed under the act of 1860; but the provisions of that act, in all respects affecting the question under consideration, are substantially the same as in the act of 1861. It was held—and we think correctly—that the property was not assessable in Mariposa county. The property to be assessed in such cases is money at interest or debts. The money at interest, debt or obligation, is the principal thing, and the mortgage is only a security — a mere incident to the debt or obligation. The mortgage has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact, that the mortgage exists in a particular county, gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times—for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

And to the same effect is the opinion and judgment of the court in the case of Latrobe, trustee, vs. The Mayor and City Council of Baltimore.—19 Maryland Reports, pp. 20–21, in which Cochran, J., says:

"This is an appeal from a judgment obtained in a suit at law, brought to recover taxes assessed on mortgages of property in the city of Baltimore, made to the appellant as trustee of the estate of Joseph Thornburg, deceased. At the time of the assessment and institution of the suit, the appellant was a resident of Howard county, the *cestuis que trust* being, at the same time, residents of Baltimore city, and the question as to the liability of the appellant for the taxes assessed, is the only one presented." * * * * * * *

"Upon the principle that the possession of personalty follows the person owning the legal title, the mortgages, on the valuation of which the assessment of the taxes in this case was made, so far as they could be made the basis of an assessment, were beyond the jurisdiction of the appellee. The assessment, in such cases, is made upon the amount of the mortgage debt, and not upon the value of the property mortgaged to secure it. As the basis of the assessment is the amount of the debtor's obligation to the creditor, the recording of a mortgage in another county or district than that of the creditor's residence, collaterally securing its satisfaction, cannot have the effect of locating the debt where the mortgage is recorded."

"We think the taxes, sought to be recovered in this case, were assessed without authority, and therefore reverse the judgment."

The converse of the proposition for which we contend has been held by the Supreme Court of Pennsylvania, in a well considered opinion delivered in M'Keen *vs.* the County of Northampton, 13 Wright, 519, where it is clearly shown and expressly decided, that the owner of shares of stock in an incorporated company—and *a fortiori*, we say, a creditor of such company—has no title whatever in the real estate or other property of the company, and that such shares are taxable as the property of the stockholder, only in the State of which he is a resident. Justice Agnew, delivering the opinion of the court, says:

"The defendant below being a citizen of this State, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within its authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him, and when he dies his domicil governs its succession. It goes to his executor or administrator, and not to the heirs, and is carried into the inventory of his personal effects. When it is argued, therefore, that the foundry, machine shop, and other estate of the corporation, being within the State of New Jersey, are subject wholly to the same exclusive State jurisdiction there which we claim for this State over property within its territory, another ownership is stated and a new issue introduced. But to that property the defendant below has no title, his title being in the shares he holds, and not in the property of the corporation. No execution against him there would sell a spark of right to it, nor would his heirs-at-law succeed to any estate in it. Unquestionably it may be taxed as the property of the corporation in New Jersey; but the ownership there is that of a corporation, the legal entity, and not of the natural persons who own the shares of its stock."

"We have authorities directly upon this question deciding the principle, though upon a different species of tax, the collateral inheritance tax—in Re Short's estate, 11 Harris, 63. There the decedent, a resident of Philadelphia, owned half a million of dollars in stocks, and corporations, of other States, and bonds of the State of Kentucky, and a bank deposit in New York, and all were held to be subject to the collateral inheritance tax here. Gibson, C. J., opens his opinion by stating: 'that Mr. Short's property out of the State subjected him to personal liability for tax assessed on it here in his life time is not to be doubted; the general rule is that the situs of personal property follows the domicil of the owner of it insomuch that even a creditor cannot reach it in a foreign country, except by attachment or some other process provided by the local law; certainly not by a personal action without appearance or something equivalent to it.' To the same

effect is the case of Hood's estate, 9 Harris, 106, the difference of domicil merely leading to an opposite result."

This decision is undoubtedly correct. It was not referred to, either in argument or by the court, so far as appears by the report of the case, in Maltby vs. The Reading Railroad Company, 2 P. F. S., 140. And we do not see how it can be reconciled with that case—which certainly did not intend to overrule it—unless the same property can have a *situs* in two or more different States at the same time, for the same purpose precisely; which seems to us as impossible as that the same body should be in two places at the same instant.

Here then we have it clearly and distinctly declared that in Pennsylvania the general principle, that the *situs* of choses in action is determined by the residence of the owner, is recognized and applied in her tax laws; and it is certainly too plain for argument that upon this principle the tax claimed in this case cannot be sustained. Either this principle must be abandoned, and the opposite one adopted, that the *situs* is where the tangible property is situated, out of which the chose in action arose, as it were, which would be a new principle not recognized as law hitherto; or abandoning all principle, the law that might makes right must be adopted, and the rule applied in any given case must depend upon the question whether the tangible property, or the chose of action, with the person of the creditor, is in the State.

The following quotation from the opinion of the Court of Appeals, in Hoyt *vs.* The Commissioners of Taxes, 23 N. Y., 230, delivered by Comstock, C. J., shows the impossibility of reconcilng these two opposite principles. "The statute means one thing or the other. It cannot have double and inconsistent interpretations. And, as this is impossible, so we cannot, under and according to the statute, tax the citizen of Massachusetts in respect to his chattels here, and at the same time tax the citizen of New York in respect of his chattels having an actual *situs* there. In both cases the property must be 'within this State,' or there is no right to tax it at all. It cannot be true in fact, if a Massachusetts man owns two spans of horses, one of which draws his carriage at home, and the other is kept on his farm here, that both are within the State. It cannot be true by any legal intendment, because *the same intendment which locates one of them here must locate the other abroad, and beyond the taxing power.* It seems to follow, then, inevitably, that before we can uphold the tax which has been imposed upon the relator's property situated in New Orleans and New Jersey, we must first determine that if he resided there, and the same goods and chattels were located here, they could not be taxed as being within the State. Such a determination would, I am satisfied, contravene the plain letter of the statute, as well as all sound principles underlying the subject."

So, here, it cannot be true in fact if the bonds of a corporation of another State, held and owned by a resident of Pennsylvania, are in the State and subject to the jurisdiction and taxing power of the Legislature of Pennsylvania, that the bonds of a Pennsylvania corporation, held and owned by a resident of another State, are also within and subject to the same jurisdiction and power; and "it cannot be true by any legal intendment, because the same intendment which locates one of them here *must* locate the other abroad and beyond the taxing power." Therefore, we contend, since the Supreme Court of Pennsylvania have decided, by the well considered opinion quoted at length above, which is entirely in accordance with the current of their decisions and with the long continued uniform practice of the State in regard to taxation, as well as with the decisions of the courts of all the other States, that the stock and, *a fortiori*, the bonds held and owned by a resident of Pennsylvania, are within the jurisdiction and taxing power of the State, though the corporation and all its property is situated in some other State; that they are bound both by the fact and by legal intendment to hold—and if not they, this court for them—that the bonds of a Pennsylvania corporation, held by non-residents, as in this case, are not within the same jurisdiction and taxing power. In the language of the case in 3 Zabriskie, already cited, "they have legislated"—and adjudicated—"upon the principle that property in action, having no visible locality, should follow the domicil of the owner and be subject to taxation there."—And that this is the principle on which Pennsylvania has legislated; see act of April 29, 1844, section 32, copied on p. 2 of this brief, which enacts, *inter alia*, that "all shares or stock in any bank, institution or company, now or hereafter incorporated by this Commonwealth, *or any other State or government*, * * * * * * *and all money loaned or invested on interest in any other State* * * * * * *shall be valued and assessed for taxation*," &c., &c.—"Adopting this principle in regard to their own citizens, it is not probable that the Legislature,"—or the court,—"designed to repudiate it in regard to citizens of other States. Such a course of legislation,"—or of adjudication,—"besides its tendency to provoke retaliation by other governments, would operate unjustly and oppressively on every individual living in one State and owning property,"—or bonds secured—"in another, by subjecting him to double taxation."

We think it much more probable, that the rule laid down in Maltby *vs.* The Railroad Company, was adopted hastily, without sufficient consideration, and without adverting to the consequences which would logically result from it, or to its antagonism to the principles already adopted by the court, and which had become a part of the settled law of the State. And hence we consider this a proper case for this court, on the principle laid down and enforced in the cases of Gelpeke *vs.* City of Dubuque, 1 Wal-

lace, 175, and Butz *vs.* City of Muscatine, 8 Wallace, 575, to follow those decisions of the State court which best accord with its own decisions, with sound principle, and with the constitutional rights of citizens of other States.

We do not think that our objections to this tax, when imposed upon non-residents, are met by saying that the franchises and property of the debtor corporation are protected by the civil and military power of this State, and that taxation is the correlative of protection. All this is undoubtedly true; but it must be borne in mind that the franchises and property of the corporation themselves pay the taxes which are the correlative of the protection which they receive. The franchises and property of a corporation having a debt, are no more protected than those of one having no debt, and both pay taxes in the same proportion; and certainly the protection of the person and property of one, who is a citizen and resident of the State, is not the correlative of the taxation of another, who is neither a citizen nor resident, or of his property, which is not within the State. Besides, the tax on the bonds of a resident of the State is not levied on the ground of the protection given by the State to the corporation, its franchises and property, but on the ground of the protection accorded to the property of the bondholder himself, and the duty of every citizen to contribute to the necessities of the State. Hence, in taxing a resident, there is no occasion to inquire where his debtor resides, whether within the State or without. The tax is not paid with any reference to the debtor or his property, but is solely relative to the owner of the *choses in action*. This is clearly shown in the Pennsylvania case above cited, and is undoubtedly correct in principle.

And in this point of view also the sustaining of the tax involves the inconsistency, if not absurdity, of putting it on one ground when it falls upon a resident, and another when upon a non-resident, though the law itself makes no distinction. That is to say, in order to uphold the tax on non-residents it must be claimed that the tax is in some sense on the property of the debtor, while as to the resident it is upon his *chose in action*, his ownership of the security for the debt, and because of the protection which his property and person enjoy from the State.

When it is said, therefore, that the *choses in action* of the non-resident are taxable and taxed because of the protection afforded to the property of his debtor, we think, as is said by Justice Agnew, in the case last above cited: "a new issue is introduced," and a new principle in the science of taxation is propounded.

But the law itself gives no countenance to the argument that it is based on the—as we consider it—self contradictory ground of the ownership by the creditor, of the property of the debtor. It has none of the ordinary features of a tax law, nor is it encumbered with any of the provisions or

machinery usually supposed to be necessary to the successful working of such a law. There is nothing in the nature of a levy or assessment, and no provision whatever for notice to or right of appeal by the non-resident bondholder; indeed, it is only incidentally that the law alludes to him at all, and only in connection with the, as it would seem, trifling circumstance that the contribution exacted must fall upon him.

It is a bare and bald command to the officers of the debtor company to "retain" part of the interest due to its creditors, and to pay it to the State. It enacts that "every president, treasurer, cashier, or other officer of any company incorporated, or that may hereafter be incorporated, which pays interest to its depositors, bondholders, or other creditors, upon which by the laws of the Commonwealth a State tax is imposed, shall, before payment of the same, *retain from said depositors, bondholders, or other creditors*, the amount of State tax imposed by existing laws, and shall pay over the same to the State Treasurer."

In the language of Lowrie, C. J., 3 Wright, 80, "such legislation seems hardly consistent with the usual comity, or political generosity, which we exercise in our relations with the citizens of sister States."

Such a tax is thus described by Chief Justice Redfield, in his American Railway Cases, 513: "It is a levy upon the corporation, to be paid by non-resident" bondholders "who have no notice of the proceedings, and where the whole proceedings are without any jurisdiction over them. It has been held that such a levy is void on general principles, it being in the nature of a decree of forfeiture or confiscation of property, or its profits or a portion of them, and the principle would be the same if it went the whole extent of all the profits or all the property; and this wholly without jurisdiction. It seems nothing less than an arbitrary appropriation of private property, belonging to citizens resident abroad, to the public use of the State, when the owners are not notified of the proceedings or represented in the Legislature."

It is a levy or contribution, imposed by the State of Pennsylvania, on the income of citizens and residents of other States, when at the same time they are unquestionably liable to a tax upon the same income, in the States of their residence.

We contend that the judgment of the Supreme Court of the State should be reversed:

SECOND.—*Because the law is so antagonistic to the true principles of taxation, settled and adopted in Pennsylvania, as well as elsewhere, as to warrant the conclusion that it was not intended to apply to non-residents or their bonds, and that if so applied it is clearly unconstitutional.*

In the case of Butz *vs.* City of Muscatine, already cited, this court said: "In all cases brought here under the twenty-fifth section of the Judi-

ciary Act, this court has never hesitated to determine for itself the construction and effect of any statute of a State, brought under review, without reference to the previous adjudications of the highest court of the State upon the subject. In the opinion delivered in the case of the Jefferson Branch of the State Bank of Ohio *vs.* Skelley—1 Black, 436—it was well asked: Of what value would the appellate power of this court be to the party aggreived if such were not the rule? In that case and in all other cases brought here, involving the same question, an act of the Legislature of Ohio was pronounced invalid, and the judgments of the Supreme Court of the State were reversed. Cases may be brought here from the Circuit Court of such a character that it is necessary to the right administration of justice that we should proceed upon the same principle in deciding them. Indeed, questions which are identical, may be brought here in both ways. Under such circumstances it will hardly be insisted that State adjudications are to control in the one case and not in the other. Our duty depends on the questions involved, and not upon the channel through which the case comes before us. Where the settled decisions in relation to a statute, local in its character, have become rules of property, these remarks have no application. In such cases, this court will, as it always has done, follow such adjudications. The cases of a different character, involving State statutes, in which the adjudications of the courts of the States in relation to them have been departed from by this court, extend in an unbroken series, from an early period, after its organization, to the present time."

Assuming then, that, notwithstanding the decision of the Supreme Court of Pennsylvania in this case, the question whether this law was intended to apply to and impose a tax upon non-resident bondholders, is an open one; we argue that it was not intended so to apply. And this is shown by the act of May 1, 1854, which is given in full on p. 3 of this brief, and is one of the laws upon which the claim to this tax is supported by the Supreme Court of Pennsylvania, in the case of Maltby *vs.* the Railroad Company, already cited. This act is entitled "An Act to exempt certain loans and bonds from taxation," and provides, *inter alia*, that "all bonds or certificates of loans of any railroad company, incorporated by this Commonwealth, shall be liable to taxation for State purposes only."

This provision serves to illustrate the illegality and unconstitutionality of imposing this tax upon non-residents, and hence leads to the strong inference that this was not intended. It is a positive declaration of the legislative will that property of this description shall pay no other tax than the one here claimed. Yet the non-resident who is sought to be taxed here, cannot claim the protection of this law, and must, in the State and place of his residence, pay the same tax on this property, whether State, county, city, or other, as is paid by like property held there. This shows how en-

tirely he is beyond the jurisdiction of this law; it is as powerless to protect him as to tax him directly, and by being taxed indirectly, though the power which the State has over his debtor, he is subjected, because of his liability to the same kind of a tax, upon the same property, in the State of his residence, to a burden which is not imposed upon the bondholder who is a resident of the State. Ought we not, therefore, to conclude that no such injustice was intended, and that the law was not designed to apply to him?

As was said by Comstock, C. J., in Hoyt *vs.* The Commissioners of Taxes, cited above: "It is pertinent to inquire whether the Legislature intended to tax property thus situated. It 'shall not be assessed against any other person.'—Here, 'shall be liable to taxation for State purposes only.'—This prohibition would be impossible and absurd, in the case supposed of chattels having a *situs* in another jurisdiction. Yet the prohibition relates to the very thing which is the subject of the assessment, and from this I think it a very just inference that the Legislature in enacting the section had in view only personal estate within the State; in other words, the property which they had previously declared to be liable to taxation."

These considerations, we think, lead plainly to the conclusion that the Legislature of Pennsylvania did not intend this tax to be applied to non-resident bondholders. In the language of the Chief Justice of the State of New Jersey, already quoted—3 Zabr., 517—"It cannot be presumed, in the absence of clear and explicit enactment, that the Legislature designed to weaken the bonds of the Union by discouraging commercial intercourse between the citizens of our own and our sister States. The fair and reasonable presumption is, that they designed to adopt a general principle, just and beneficial in its operation, viz: To make all property in action taxable at the domicil of its owner, and to apply the same principle to the citizens of our own and of all other States."

And we would suggest here, in passing, whether the double taxation which would fall upon the citizens of other States, if this law were applied to them, would be compatible with their rights under the clause of the Constitution, which guarantees to the citizens of each State all privileges and immunities of citizens of the several States?

We are well aware that it is settled in Pennsylvania that taxation, to be legal, need not be equal, and that there may be what in one sense can be called double taxation, as of lands and mortgages upon them, or ground rents issuing out of them; though this is not really double taxation, because the lands and mortgages are different properties, of different species, and owned by different persons; but we do not know nor believe that it was ever intended to be decided, that two or more States, separate and independent,

geographically, as well as politically, can each legally tax the same property in the same form, and as the property of the same person, for the very same purpose, each having the right to tax, and neither having the power to restrain the other from taxing. Yet unless such an exercise of the taxing power be legal and constitutional, this State cannot impose this tax upon non-resident bondholders; for it cannot be questioned that the State of their residence can lawfully tax them on account of their bonds.

The cases cited by the learned judge of the court below, to show that double taxation is not unlawful, are, none of them, instances of the kind of double taxation complained of in this case. They are instances where land and the mortgage secured on it, or the real estate of a corporation and its capital stock, or the capital stock of a corporation and the shares of stock owned by an individual, in such corporation, are taxed. In none of these instances is the same thing taxed twice. The land is real, the mortgage personal property. And the mortgage, if held by the owner of the land, could not be taxed; it would be extinguished. So, as stated by C. Justice Thompson, in Lycoming County *vs.* Gamble, 11 Wright, 110, "shares of stock and capital stock of a corporation are distinct and different things obviously," and so are the capital stock of a corporation and its real estate. Here, if the principle, or rather the practice, contended for by the Commonwealth, in this case, is correct, the same thing, in the hands of the same person, may be taxed in the same way, for the same purposes, in two different States, at the same time.

We contend that the judgment of the Supreme Court of the State of Pennsylvania should be reversed:

THIRD—*Because, by the law declared valid by that judgment, the Legislature of Pennsylvania attempt to exercise jurisdiction beyond the State, and to affect contracts and rights of citizens of other States, which are protected by the Constitution of the United States and the judicial power granted to its courts.*

The argument on this point is founded on the principle enunciated by Justice Johnson, in summing up the conclusion arrived at by the majority of the court in the case of Ogden *vs.* Saunders, 12 W., 369, as to the power of the States to pass insolvent laws, viz:

"When the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial power granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States."

In the Supreme Court of the United States.

OF DECEMBER TERM, 1871. No. 200.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,

PLAINTIFFS IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

Error to the Supreme Court of Pennsylvania.

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

THE LEISENRING PRINTING HOUSE, 237 & 239 DOCK ST., PHILADELPHIA.

In the Supreme Court of the United States.

WRIT OF ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

The Delaware, Lackawanna and Western Railroad Company, Plaintiff in Error, vs. *The Commonwealth of Pennsylvania.*	December Term, 1870. No. 408.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

This is a writ of error to a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of that State which was alleged to be repugnant to the Constitution of the United States.

ABSTRACT OF THE CASE.

The Delaware, Lackawanna and Western Railroad Company is a Pennsylvania corporation, which is largely engaged in the business of mining coal and transporting it from the mines in Pennsylvania to shipping points on the waters of the Bay of New York. Its funded debt amounted to about $3,500,000 when the statute of Pennsylvania which gave rise to the present controversy was passed.

This statute, which is entitled "An act imposing additional taxes for State purposes, and to abolish the revenue board," will be found at page 218 of the pamphlet laws of Pennsylvania for 1864, and in Brightly's Purdon's Digest, p. 1378, *et seq.*, pl. 2–8. Its second section, which is the only one material to this case, is as follows:—

"Every president, treasurer, cashier, or other officer of any company incorporated, or that may hereafter be incorporated, which pays interest to its depositors, bondholders, or other creditors, upon which by the laws of the Commonwealth a State tax is imposed, shall, before payment of the same, retain from said depositors, bondholders, or creditors the amount of State tax imposed by existing laws, and shall pay over the same to the State treasurer, and that all the laws regulating the mode of such payments in regard to treasurers of counties, cities and boroughs be, and the same are, extended to the financial officer thereof; and they are hereby required to collect and pay over the taxes due to the State on such payments of interest as provided in this section to be done by officers of incorporated companies; and in case of any officer neglecting or refusing to retain the same, he shall become personally liable for the amount."

It will be observed that this section does not *impose* a tax, but merely provides a method of *collecting* one already *imposed;* and, to understand its full scope and operation, reference must be made to the following sections of acts of Assembly of the State of Pennsylvania which were in force when the act of April 30th, 1864, was passed:—

"All real estate, to wit,—houses, lands, lots of ground, ground-rents, mills and manufactories of all kinds; furnaces, forges, bloomeries, distilleries, sugar-houses, malt-houses, breweries, tan-yards, fisheries and ferries, wharves, and all other real estate not exempt by law from taxation; also, all personal estate, to wit,—horses, mares, geldings, mules, and neat cattle over the age of four years; *also, all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond, or judgment;* also, all articles of

agreement and accounts bearing interest, owned or possessed by any person or persons whatever, except notes or bills for work or labor done and bank notes; also, all shares or stock in any bank, institution, or company, now or hereafter incorporated by, or in pursuance of, any law of this Commonwealth, or of any other State or government; and on all shares of stock or weekly deposits in any unincorporated saving-fund institution; and all public loans or stocks whatsoever, except those issued by this Commonwealth, and all money loaned or invested on interest in any other State," &c., &c.—* * * * "shall be valued and assessed to taxation for the purposes in this act mentioned, and for all State and county purposes whatsoever." Act of April 29th, 1844, section 32; Brightly's Purdon, p. 949, P. L., 497.

"The county commissioners of each and every county in this Commonwealth shall be, and they are hereby required annually, at the time of making county rates and levies, to assess for the use of the Commonwealth upon" (the various subjects of taxation enumerated); "and upon all other property heretofore made taxable for State purposes, or that are made so by the 32d section of this act, three mills on every dollar of the value thereof." Same act, section 34; Brightly's Purdon, p. 950, P. L., 120; P. L. 1844; 499.

(By the 86th section of the act of May 18th, 1857, P. L., 571, the tax of three mills was reduced to two and a half mills; but by the 6th section of the act of May 16th, 1861, P. L., p. 767, an addition of one-half mill to the two and a half mills was made.)

Under these acts the Supreme Court of the State of Pennsylvania held (in the case of Maltby *vs.* The Reading and Columbia Railroad Company, 2 P. F. S., 140) that either "money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment," or "all public loans or stocks whatsoever, except those issued by the Commonwealth,"—both of which are enumerated as subjects of taxation in the act of April 29th, 1844,—included the bonds of a Pennsylvania corporation,

whether held by citizens of Pennsylvania or by citizens and residents of another State or of a foreign country, and that such bonds were taxable as the property of the holders at the rate of three mills on every dollar of the value thereof. As reference is made—as well in the opinion of the court in Maltby's case and in the opinion of the court before which the present case was originally heard (see printed record, p. 13)—to an act of May 1st, 1854, that act is here inserted so that the court may have before it all the Pennsylvania legislation in reference to the taxability of the money due from corporations to the holders of their bonds.

"AN ACT

"To exempt certain loans and bonds from taxation.

"SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That all certificates of loan now issued, or which may be hereafter issued, by the city of Philadelphia or any of the incorporated districts of the county of Philadelphia, in payment of subscriptions already made or which may be hereafter made by the municipal authorities of said city or incorporated districts to the capital stock of any railroad company, and all bonds or certificates of loan of any railroad company incorporated by this Commonwealth, be and the same shall be liable to taxation for State purposes only." Pamphlet laws of 1854, p. 535.

This act—although evidently intended not to impose, but to remove, a tax—must be considered as recognizing the previous taxability of the bonds or certificates of loans to which it refers.

Maltby's case also decided that the tax which was to be deducted under the third section of the act of April 30th, 1864, from the interest paid by corporations, was the tax upon the *principal* of the bonds imposed under the act of 1844. "The tax referred to as the tax to be retained and paid over to the State treasurer," said Woodward, C. J., p. 148, "is a tax upon

interest accruing to bondholders or other creditors. But the three-mill tax is imposed not on the interest but on the principal of the plaintiff's bond. Here is a discrepancy undoubtedly, but it is more verbal than substantial. Taking the act of 1864 in connection with the prior acts to which I have referred, and reading them as parts of a legislative system for aiding the revenues of the Commonwealth, they amount to this and no more, that the three-mill tax shall be assessed upon the par value of the corporation loan, and shall be retained by the corporation officers out of the accruing interest therein."

It is, therefore, clear that the Supreme Court of Pennsylvania has interpreted the act of 1864 as requiring Pennsylvania corporations to withhold an annual tax of three mills on each dollar of the principal of their bonds from the interest payable thereon, no matter what the citizenship or domicile of the bondholders may be; and, in fact, such was the view taken by this court in The Railroad Company *vs.* Jackson, 7 Wallace, 262, of the effect of the decision in Maltby *vs.* The Railroad Company. As a tax of three mills on each dollar of one thousand dollars would amount to three dollars, the deduction required from the annual interest of a $1000 bond paying six per cent. interest, to meet this tax, would be just five per cent.; and the accounting officers of the State seem to have adopted the practice of estimating the tax on the principal of a bond as equal to five per cent. of the interest of the bond, irrespective of the rate of interest.

Such being the state of the law, as established by the Supreme Court of Pennsylvania, the auditor general and treasurer of that State stated or settled an account, on the 18th of November, 1867, against the Delaware, Lackawanna and Western Railroad Company, by which that company was charged, under the act of April 30th, 1864, with $18,721.16 as an annual tax of three mills on each dollar of 28.41 parts of its bonded indebtedness, from April 30th, 1864, to December 31st, 1866, inclusive, and was credited with $243.60, as an allowance or commission to the treasurer of the company, (see

printed record, p. 5,) thus making a balance against the company of $18,477.46. The fraction—28.41—was assumed as representing "the proportion of the road (of the D., L. & W. Company) within the State of Pennsylvania." (*Ibid.*) The company having appealed from this settlement to the Court of Common Pleas of Dauphin County, the Commonwealth of Pennsylvania, according to the practice in such cases, filed a declaration in that court on the stated or settled account, to which the railroad company pleaded "*nil debet*," (see printed record, pp. 3 and 4,) and the issue thus formed was tried in the Court of Common Pleas of Dauphin County, before the president judge, (Hon. John J. Pearson,) and a jury.

It appeared, from the evidence, that the outstanding bonds of the company, during the period included in the settlement, varied in amount from an average of $3,476,500 in 1864 to an average of $3,390,500 in 1866; that they were payable, both as to principal and interest, in the city of New York; that the interest was the New York rate, seven per cent., and that the bonds were principally held by persons who were neither citizens nor residents of the State of Pennsylvania. The treasurer of the company, whose office was in the city of New York, proved that not less than $2,000,000 of the bonds were so held, including all the bonds registered in the registry in his possession, and that, as to the unregistered bonds, he had no knowledge, personal or otherwise, that any portion was held or owned by, or owing to, persons resident in the State of Pennsylvania. (See printed record, pages 5, 10, 11 and 12.) There was no direct evidence that any of the bonds were, in fact, held by citizens or residents of the State of Pennsylvania; and in fact no evidence at all to that effect, except the inference deducible from the statement in "the specifications of objections to the settlement of the auditor general and State treasurer," which were given in evidence, (printed record p. 6,) that "said bonds are *principally* held by non-residents of Pennsylvania, and are, therefore, not subject to said tax."

It also appeared in evidence that the several issues of bonds,

which made up the aggregate of the funded indebtedness of the company, were secured by mortgages on the railroad and coal lands of the company in the State of Pennsylvania.

The learned president of the Common Pleas, following the decision of the Supreme Court of Pennsylvania in Maltby *vs.* The Railroad Company, instructed the jury that the defendants were liable for the amount claimed, with interest at the rate of twelve per cent., from the expiration of thirty days from the date of the settlement.

As to the argument, that the act of 1864 was in conflict with the Federal Constitution, and that "the Legislature cannot tax the personal property and choses in action of non-residents here," "we are referred," said the learned judge, "to the opinion of Chief Justice Chase in Jackson *vs.* The Northern Central Railway Company, who held that these same laws had no binding effect on the citizens of other States or the subjects of foreign governments; but it must be borne in mind that, when that case went by appeal into the Supreme Court of the United States, no opinion was expressed or even intimated on that subject, but the case was ruled on an entirely different principle," &c. "It is also contended," added the learned judge, "that this law impairs the obligation of contracts, by taking off a portion of the creditor's claim; but that is in all cases a consequence of taxation."

The jury rendered a verdict for the plaintiff (the Commonwealth) in the sum of $21,588.05, on which judgment was afterwards entered; and to this judgment a writ of error was taken to the Supreme Court of the State of Pennsylvania, where it was assigned as error, among other things, that the court erred (1) in charging, "that the tax now in controversy is valid and binding, both on the corporation and its creditors, is clearly settled in Maltby *vs.* The Railroad Company, 2 P. F. Smith, 140, and that, too, whether the creditor resides in Pennsylvania or elsewhere. The non-resident can be taxed for the protection which his debt receives from our laws, by granting and securing the franchises of the company to which he

has entrusted his money;" (2) in charging as follows:—"It is also contended that this law impairs the obligation of contracts, by taking off a portion of the creditor's claim; but that in all cases is a consequence of taxation. It does not enable the debtor to discharge his obligation with a less sum, but requires the corporation to become the collector of the tax for the State, and pay the amount into the public treasury of the State, instead of giving it to the creditor, who would otherwise pay his taxes;" (3) in charging "that the officers of the corporation could be, and were, required to collect the tax, and it was their duty to retain it at the time of paying the interest to their creditors." (See printed record, p. 18.)

The judgment of the Common Pleas was affirmed in the Supreme Court, the entry of the judgment of affirmance being as follows:—"And now, to wit, July 7th, 1870, this cause came on to be heard, and, on due consideration, it is ordered that the judgment of the court below be affirmed, this court being of opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law."

The writ of error, by which the record now before the court was brought up, was sued out to this judgment of the Supreme Court of Pennsylvania, and, in accordance with the recently-established rules of the court, the plaintiffs in error submit the following

ASSIGNMENTS OF ERROR:—

1. The Supreme Court of the State of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Dauphin County, Pennsylvania.

2. The Supreme Court of the State of Pennsylvania erred in overruling the following assignment of error to the charge of the Court of Common Pleas of Dauphin County, Pennsylvania, viz.:—"The court erred in charging the jury as follows:—That the tax now in controversy is valid and binding, both on the corporation and its creditors, is clearly settled in Maltby *vs.* The

Philadelphia and Reading Railroad Company, (should be the Reading and Columbia Railroad Company,) 2 P. F. Smith, 140; and that, too, whether the creditor resides in Pennsylvania or elsewhere. The non-resident can be taxed for the protection which his debt receives from our laws, by granting and securing the franchises of the company to which he has entrusted his money."

3. The Supreme Court of the State of Pennsylvania erred in overruling the following assignment of error to the charge of the Court of Common Pleas of Dauphin County, Pennsylvania, viz.:—"The court erred in charging the jury as follows:—It is also contended that this law impairs the obligation of contracts, by taking off a portion of the creditor's claim; but that is in all cases a consequence of taxation. It does not enable the creditor to discharge his obligation with a less sum, but requires the corporation to become the collector of the tax for the State, and pay the amount into the public treasury, instead of giving it to the creditor, who would not otherwise pay his taxes."

4. The Supreme Court of the State of Pensylvania erred in overruling the following assignment of error to the charge of the Court of Common Pleas of Dauphin County, viz.:—"The court erred in charging the jury as follows:—That the officers of this corporation could be, and were required to collect the tax, and it was their duty to retain it at the time of paying the interest to their creditors. That the law requiring them to retain and pay it over was a public statute, of which they were bound to take notice, without any warning from the department."

BRIEF OF ARGUMENT ON BEHALF OF THE PLAINTIFF IN ERROR.

It must, of course, be shown that the third section of the act of April 30th, 1864, is "repugnent to the Constitution, treaties, or laws of the United States," before this court can be asked to reverse the judgment of the Supreme Court of Penn-

sylvania. The counsel of the plaintiffs in error are not aware of any treaty or statute of the United States with which the act in question conflicts; but they contend—

FIRST.—*That it does conflict with the clause of the first paragraph of the tenth section of first article of the Constitution of the United States, which provides that no State shall pass any law impairing the obligation of contracts.*

1. It is impossible to deny that, *prima facie*, at least, the law in controversy does impair the obligation of contracts. When a debtor, who has contracted to pay sixty dollars each year as interest on his debt, is permitted to pay but fifty-seven, the law which authorizes this reduction does certainly seem to impair the obligation of the contract which required the payment of sixty. It may be that the apparent inconsistency between the operation of the law and the obligation of the contract can be shown to be but apparent, and that the creditor who receives but fifty-seven dollars is paid all that he is entitled to receive; but, certainly, the difficulty presented is one that needs explanation.

2. The explanation offered is, that the sum retained from the creditor is retained to pay the tax chargeable upon the money due him. It is said (see charge of Judge Pearson, printed record, p. 14) that the law "does not enable the debtor to discharge his obligation with a less sum, but requires the debtor to become the collector of the tax for the State, and to pay the amount into the public treasury instead of giving it to the creditor, who," it is added, "would not otherwise pay his tax;" a remark which may require some qualification, if intended to have a general application, but which is unquestionably correct as applied to the circumstances of the present case.

This explanation was considered satisfactory by the Supreme Court of Pennsylvania in Maltby's case, although the judge who delivered the opinion of the court (Chief Justice Woodward) seems not to have been free from doubt on the subject.

"How far modern tax laws" (he remarks at page 148, 2 P. F. Smith) "shall be permitted to impair and alter private

contracts, is a great question which must be decided ultimately by the Supreme Court of the United States. I have my own private opinions, which would probably be found to differ from a majority of this court; but I do not think it worth while to discuss the constitutionality of these Pennsylvania statutes whilst the country acquiesces in the excise law of the General Government, under the operation of which the same question might be frequently raised. For instance, a section of the excise law of 1864 authorized manufacturers who had existing contracts for the delivery of manufactured goods at the date of the law, to add the increased duties to the contract price and collect them from the vendee,—and this is now done. So far as I know, no question has been raised under that law upon the inviolability of contracts; and, perhaps, the sound conclusion is, that governmental taxation—a thing always to be anticipated when contracts are made—does not impair the obligation of contracts, within the meaning of the constitutional inhibition. If this be conceded as a principle, then the mode of collecting the tax, whether by a Government agent, a debtor corporation or manufacturer, is mere machinery and involves no principle whatever. For the present, therefore, and speaking for the court, I lay it down that the acts of Assembly to which I have referred are constitutional and valid; that they tax the loan as property found here in Pennsylvania, and that they appoint the debtor corporation the collector of that tax for the benefit of the State government."

3. But conceding, for the purposes of the argument, the entire sufficiency, in ordinary cases, of the explanation suggested, will it hold good in a case where the State has no right to tax the money of the creditor?

Is it not plain, on the contrary, that a conclusion in favor of the validity of a tax law, which diverts a part of the money due to a creditor into the public treasury, must rest on the premise that the State has a right to tax the money due to the creditor?

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Pennsylvania creditor is not broken, when the debtor appropriates the money due to the creditor, partly to paying the creditor personally and partly to paying a tax due to the State of Pennsylvania on the money owed, can it be said that a Pennsylvania debtor does not break the contract, by which he has promised to pay a New York creditor a certain sum, when he retains a portion of that sum to pay the State of Pennsylvania a tax which she is not authorized to claim?

4. The real question, therefore, in this part of the case, is whether the State of Pennsylvania can lawfully tax money due by her citizens to persons who are neither citizens of, nor residents in, Pennsylvania.

In the Railroad Company *vs.* Jackson, 7 Wallace, 262, this question was presented, but not decided; but it may be inferred from the language of the judge (Nelson J.) who delivered the opinion of the court, that he, at least, was not inclined to admit the lawfulness of such an exercise of the taxing power:—

"We must say," he observed, (p. 267,) "that the tax upon the promissory note or bond given by the resident debtor, and the withholding of the amount from the non-resident creditor, would seem to be a tax upon such non-resident. It is not a tax on the money lent, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond which is in the hands of the non-resident holder;" and when the same case was in the Circuit Court of the United States for the District of Maryland, the remark of the chief justice, that he saw nothing in the statutes of Pennsylvania which warranted the supposition "that its Legislature ever intended to tax bonds, or the interest on bonds, held by citizens of other States or the subjects of foreign powers," may fairly be understood as indicating that such an intention should not lightly be imputed to a State.

It is believed that the question is fairly stated, as simply whether the State of Pennsylvania can lawfully tax money due by her citizens to persons who are neither citizens of, nor residents in, Pennsylvania. The act of April 30th, 1864, does,

indeed, apply to incorporated companies only; but it is difficult to see how the principle at issue is varied by this circumstance. What argument can be adduced to show that a debt due by an individual citizen may not be taxed while a debt due by a corporation may? What is the distinction between a debt due by a corporation and a debt due by an individual? Do they belong to different species of property? What technical designation of property applies to one and is inapplicable to the other? These questions seem to admit of but one answer.

But it is said, in the opinion of the learned president of the Common Pleas of Dauphin County, that "the non-resident can be taxed for the protection which his debt receives from our laws, by granting and securing the franchises of the company to which he has entrusted his money." (Printed record, p. 13.) This remark was doubtless not intended to show that there was any practical or theoretical difference between a debt due by a corporation and a debt due by an individual; but does it suggest any?

Might it not be said that a debt due by an individual citizen of Pennsylvania is protected by the law of Pennsylvania, securing to the debtor the possession and enjoyment of his property, and the right to carry on any lawful occupation or business in which he may choose to engage?

Nor can it be alleged that the question is too broad, as including money due, in a general and unrestricted sense; whereas the money sought to be taxed in this case is secured by mortgages specially authorized by the law of Pennsylvania, and covering property in that State. This distinction seems to have occurred to Chief Justice Woodward, when deciding Maltby's case. "It," (the plaintiff's bond,) says he, (p. 147, 2 P. F. Smith,) "is founded upon and derives its value from a mortgage; but that mortgage is here, and the franchises and properties which the mortgage binds are here within our jurisdiction. The bond signifies his right to receive so much money out of the mortgaged estate; but that estate not only belongs

to our jurisdiction, but was in part created by our authority, and the power to raise the mortgage, like all the franchises of the company, were conferred by State authority."

Whether the State of Pennsylvania could lawfully tax the interest of a foreign bondholder in the property mortgaged to secure his bond, is a question which need not be now discussed, since she has not thus far attempted to impose such a tax; and if the right to impose it were admitted, it would not tend to prove the lawfulness of the tax which she has imposed.

The tax sought to be collected, under the act of 1864, is the tax levied on "money owing by solvent debtors," by the act of April 29th, 1844; and it is to be retained from interest paid "to depositors, bondholders, or other creditors," irrespective of the security which they may hold. Can it be pretended that the act of 1864 was meant to apply to bonds only which were secured by a mortgage? or that the bonds of the plaintiff in error would cease to be taxable, if the mortgages by which they were secured should be canceled or should be shown to be void for want of proper authority to execute them? And although it is, as Judge Pearson says, (printed record, p. 15,) "a well-settled principle" (and he might have added, a favorite principle) "of Pennsylvania jurisprudence, that there is nothing illegal in double taxation," it can hardly be presumed that the Legislature of Pennsylvania meant that the par value of a bond should be taken as the taxable value of the holder's interest in the property mortgaged to secure the bond, without regard to the actual value of the property, or the amount to which it had previously been encumbered.

5. On what principle or theory then can the right claimed by the State of Pennsylvania to tax money due by her citizens to the citizens of other States, or to foreigners, be sustained? Certainly not on any principle or theory which assumes that the taxing power of the State of Pennsylvania extends to the persons of such creditors; for no such principle or theory can be itself sustained. In fact, the right to tax the citizens of other States is expressly repudiated in the very case in which the

validity of the tax upon money due to citizens of other States is maintained. "It is undoubtedly true that the Legislature of Pennsylvania cannot impose a personal tax upon the citizens of another State," said Woodward, C. J., in Maltby's case, p. 146 (and by personal tax must be meant not merely a poll or capitation tax, but any tax assessed against the tax-payers personally). It can then be only on the theory of the tax being leviable *in rem*, and of either the actual or technical *situs* of the *res*—the money due—being within the jurisdiction of the State of Pennsylvania, that the tax can be sustained; and this was the theory adopted by the Supreme Court of Pennsylvania. "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but where the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides elsewhere. The duties of sovereign and subject are reciprocal, and any person who is protected by Government in his person or property may be compelled to pay for that protection." (Woodward, C. J., *ibid.*)

7. The issue then would seem to be narrowed down to a single point, and that is, whether debt due from a citizen of Pennsylvania to a citizen of New York is either actually or technically situated within the limits of the State of Pennsylvania?

Of course a debt has no actual or tangible *situs;* and the phrase—"money owing"—used in the act of April 29th, 1844, means nothing more than debt. Any other construction would render the act totally inoperative; and, besides, the Legislature could not possibly have supposed that it was the practice of even "solvent debtors" to appropriate and set apart physically a number of coins or of bank notes as the money belonging to the creditors to whom they are indebted "by promissory note, penal or single bill, bond or judgment."

The technical *situs* of the debt must necessarily be determined by some technical rule, maxim, or theory; but what rule,

theory, or maxim refers the *situs* of a debt, viewed as personal property, to the domicile of the debtor and not that of the creditor? The general rule as to the *situs* of personal property undoubtedly is that it follows the person of the owner. *Mobilia personam sequuntur* may be said to be a legal axiom. (See Story's Conflict of Laws, sec. 380, and the numerous cases there cited.)

"Personal property, in consideration of law, has no fixed locality," said Lewis, J., in delivering the opinion of the Supreme Court of Pennsylvania in the case of Hood's Estate, 9 Harris, 106, "but follows the person of the owner, and is therefore subject to the law of his domicile, and may be taxed for the support of the government under which its owner resides."

It may be that personal property which has an actual *situs* cannot be withdrawn from the taxing powers of the State within whose jurisdiction it is actually situated. The opinion of Chief Justice Comstock, in Hoyt *vs.* The Commissioners of Taxes, (9 Smith, 23 N. Y., 224,) is certainly an able argument for considering the actual *situs* of such property as the legal *situs* for all purposes of taxation; and the New York Court of Appeals, over which he then presided, with an unanimity somewhat rare in that tribunal, concurred in deciding that a statute of New York, providing that all lands and all personal property *within* the State should be liable to taxation, did not extend to the personal property of a citizen of New York which was actually situated in another State. "It is conceded," said the chief justice, "that lands lying in another State or country cannot be taxed against the owner resident here; and no one ever supposed the contrary. Yet it is claimed that goods and chattels situated in Louisiana or in France can be so taxed. The legislature, I suppose, could make this distinction; but that they have not made it in the language of the statute is perfectly clear. Nor is the reason apparent why such a distinction should be made. Lands have an actual *situs* which, of course, is immovable. Chattels have also an actual *situs*, though they can be moved from one place to another. Both are equally

protected by the laws of the State or sovereignty in which they are situated, and both are chargeable there with public burdens according to all just principles of taxation. A purely poll-tax has no respect for property. We have no such tax. With us taxation is upon property, and so it is in all the States of the Union. So, also, in general, it is in all countries. The logical result is, that the tax is incurred within the jurisdiction, and under the laws of the country where it is situated."

He then proceeds to combat the universal applicability of the fiction of law, that personal property "has no *situs* away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicile," and infers that there seems to be no place for that fiction in a well-adjusted system of taxation. "In such a system," he adds, "a fundamental requisite is that it be harmonious; but harmony does not exist unless the taxing power is exerted with reference exclusively either to the *situs* of the property or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to assume, and indeed we are bound to assume, that other States and governments have adopted the same rule." (Page 229.)

But whatever may be or has been said in favor of taxing movable property in the jurisdiction of its actual *situs*, instead of the jurisdiction in which its owner is domiciled, can have no application to the intangible property known as *choses in action*, which have no actual *situs*, and can have no legal *situs* other than that of their owner.

The most extraordinary consequences might ensue if this were not so. Every change of residence by a debtor would subject the property of his creditor to taxation in a new jurisdiction, and a migratory debtor would soon exhaust the debt by paying taxes on it. The opinion of Chief Justice Comstock, in the case in 23d New York, was predicated of movable property capable

of having an actual *situs;* and he expressly says, "This conclusion is intended to embrace only property which is visible and tangible, so far as to be capable of a *situs* away from the owner or his domicile; and I do not consider the question in reference to personal estate of a different description; it must be within this State in order to be subject to taxation, for so is the statute." He does, indeed, add, "But that may be true of *choses in action* and obligations for the payment of money due to a creditor resident here, from a debtor whose domicile is in another State. If the securities are separated from the person and domicile, and are actually in the hands of an agent in another State for collection, investment and reinvestment, it may be that the capital thus situated should be regarded as foreign, and not domestic, in the absence of any special statutory provision intended for such a case. Questions of this character need not now be determined" (p. 240); but this suggestion, whatever may be its worth, does not intimate that the domicile of the debtor can, simply as such domicile, be the legal *situs* of the debt, and can, besides, have no practical application to the circumstances of the present case. Nothing can be more unlikely, however, than that any State would permit available debts due to a domiciled resident to go untaxed, because he had sent the bonds or notes to an agent in another State, for collection and investment of the proceeds there.

The Supreme Court of Pennsylvania has fully endorsed the doctrine, that the domicile of the owner is, for all purposes of taxation, the *situs* of choses in action and other intangible personal property. This will be seen by reference to the case of McKeen *vs.* The County of Northampton, 13 Wright, 519, where it was held that shares of stock in a corporation of another State, held by a citizen of Pennsylvania, were taxable in Pennsylvania. "The defendant below being a citizen of this State," said Agnew, J., by whom the opinion of the court was delivered, "it is clear he is subject personally to its power to tax, and *that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within the*

authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him, and when he dies his domicile governs its succession. It goes to his executor or administrator, and not to his heirs, and is carried into the inventory of his personal effects. When it is argued, therefore, that the foundry, machine-shop, and other estate of the corporation, being within the State of New Jersey, are subject wholly to the same exclusive State jurisdiction there which we claim for this State over property within its territory, another ownership is stated and a new issue introduced. But to that property the defendant below has no title—his title being in the shares he holds, and not in the property of the corporation. No execution against him would sell a spark of right to it, nor would his heirs-at-law succeed to any estate in it. Unquestionably, it may be taxed as the property of the corporation in New Jersey; but the ownership there is that of the corporation, the legal entity, and not of the natural persons who own the shares of its stock." But whilst thus recognizing and insisting upon the doctrine that the domicile of the owner is the taxable *situs* of his intangible personal property, the Supreme Court of Pennsylvania also holds that that kind of personal property which, above all others, is intangible, viz., debts, has also another taxable *situs* in the jurisdiction where the debtor resides. Shares of stock in an incorporated company might, with great plausibility, be said to have a local *situs* where the property of the company is situated,—since the shares are, in one sense, fractional interests in the property,—and yet their taxable *situs* is said, and no doubt properly said, to be where their owner resides; but what interest, in fact or in law, has a foreign creditor in the property of his debtor in Pennsylvania? Suppose the debtor has no property in Pennsylvania, or no property anywhere that can be made applicable to the payment of the principal of the debt, although he manages to pay the interest, what then becomes of the theory of localizing the debt where the debtor's property is situated? It will hardly be said that the creditor has any *property* in the person of his debtor.

"The bonds of a company incorporated under the laws of this State are no more 'personal estate within this State,'" said Elmer, J., in The State *vs.* Ross, 3 Zabriskie, 525, "than the bonds of any other company, or of any individual citizen or foreigner. If owned by a person whose residence is in this State, within the meaning of the act, then they are personal property within the State, otherwise not." In this case (State *vs.* Ross) it was held, that bonds of the Camden and Amboy Railroad Company held by a citizen of New Jersey who "owned a house and establishment in Princeton, in which he resided with his family and servants for five or six months in each year during the sickly season in Georgia," were not taxable in New Jersey, under a statute which taxed "all lands and all personal estate within this State" (New Jersey). "The only question presented by the exception (to the assessment on the bonds)," said Chief Justice Green, "is whether the bonds, notes, stocks, or other property in action, of persons not inhabitants of this State, are liable to taxation by our law; the debtor or corporation in which the stock is owned being within this State. The fact that the individual whose property is assessed is living temporarily within the State, cannot vary or affect his rights."

It cannot be denied that the language of the act is broad enough to cover the property thus circumstanced. It is true, as was contended in the argument, that the fourth section of the act does in very terms declare that the personal estate made liable to taxation by the act shall include debts due from solvent debtors, whether on contract, note, bond, or mortgage, public stocks, and stocks in corporations, whether within or without the State. But it is apprehended that the whole office of this fourth section is to define the meaning and intent of the phrase "personal estate," used in the second section.

That it applies exclusively, as every other section of the act does, (except so far as they relate to real estate or chattels whose visible locality is within this State,) to the inhabitants of this State. If any other construction be adopted, the inevitable consequence is that citizens of other States would be made lia-

ble to taxation, not only on stocks they owned within this State, but also on stocks in corporations without the State; in other words, the citizens of Georgia would be liable to taxation in this State on stock owned by them in a corporation in Georgia. No such construction can rationally be adopted. Consequently, the section must be limited in its operation exclusively to property owned by inhabitants of this State. There is no phraseology in the act, then, which, properly considered, does include the property in action of non-residents; and I am of opinion that the Legislature did not design that the property in question should be liable to taxation, and this mainly on two grounds:—

1. Because every law must be presumed primarily to apply, when not otherwise clearly expressed, to the citizens of that State, or the subjects of that government, by which the law is enacted, and not to the citizens of other States, or the subjects of other governments.

2. By the law under consideration, the Legislature have declared that all the property in action of every citizen of this State, wherever it may be situate, shall be liable to taxation. It has enacted that debts due from foreign debtors and stocks in corporations in other States, and all the property in action of every citizen of this State, wherever it may be situate, shall be taxed to the owners thereof. They have legislated upon the principle that property in action, having no visible locality, should follow the domicile of the owner, and be subject to taxation there. Adopting this principle in regard to their own citizens, it is not probable that the Legislature designed to repudiate it in regard to the citizens of other States. Such a course of legislation, besides its tendency to provoke retaliatory legislation by other governments, would operate oppressively and unjustly upon every individual living in one State and owning property in another, by subjecting him to double taxation.

It is true that this case may be said to decide merely that the statute of New Jersey was not *intended* to tax *choses in action* of citizens of other States temporarily residing in New Jersey; but it also decides that the bonds of New Jersey corporations

held by citizens of other States were not included within the designation of "personal property within the State" of New Jersey, and that, in this respect, they were distinguishable from visible and tangible personal property belonging to such citizens.

In the case of The Union Bank of Tennessee *vs.* The State, 9 Yerger, 490, it was held that stock in banks incorporated by the State of Tennessee, held by non-resident stockholders, was not subject to the taxing power of the State. "The power to tax non-residents is denied," said Turley, J., in delivering the opinion of the court, "and we think correctly; from its very nature it must be a tax *in personam*, and not *in rem*. Stock is in the nature of a chose in action, and can have no locality; it must therefore, of necessity, follow the person of the owner; it does not partake so much of the character of personal property as even a debt due, for there is a specific sum of money which, by contract, has to be paid to another, and in some sense it may be said, therefore, to have locality. * * * * Then bank stock is not a thing in itself capable of being taxed on account of its locality, and *any tax imposed upon it must be in the nature of a tax upon income, and of necessity confined to the person of the owner; and if he be a non-resident, he is beyond the jurisdiction of the State, and not subject to her laws.*" (Pages 500–1.)

It cannot be said that this case involved merely a question of statutory construction. The language of the court shows that the *power*, and not the *intention*, of the Legislature was the point in controversy. Indeed, this is expressly admitted in the opinion of the court, for they say:—"We are satisfied that a tax upon the bank was not intended, but that an individual tax on the owners of the stock of the bank was; *that the Legislature believed that they had the power to tax all the stock, as well that owned by non-residents as by our own citizens*, and that they could compel the bank to pay the tax out of the dividends semi-annually declared, without which the tax intended to be laid on non-resident stockholders could not be collected."

In The City of Davenport *vs.* The Mississippi and Missouri

Railroad Company, 12 Iowa, 539, it was held, "That a mortgage executed by a railroad company on its depot grounds and rolling-stock situated in this State, (Iowa,) is not subject to taxation upon the failure of the mortgagee to list, when the holder or owner of the mortgage is a non-resident of the State;" and "that *mortgages before foreclosure are choses in action, and as such attach to the person of the holder, and are taxable at the place of his domicile. They are not taxable in this State, where the owners are non-residents.*"

It may be conceded that here the court decided that the statute of Iowa under which the tax was attempted to be levied was not *meant* to tax mortgages held by non-residents; but it must also be conceded that this conclusion was arrived at from an unwillingness to suppose that the Legislature intended to *usurp* a power which they could not lawfully exercise. "Section 3 of said act provides," say the court, page 547, "that all other property, real and personal, *within this State*, is subject to taxation, &c.; and mortgages and other security are within the classes of property named. Is a mortgage owned by a non-resident property within this State, within the meaning of this section? A mortgage, so long as the right of redemption continues, is real estate. Both in law and equity, the mortgagee has only a chattel interest. See Hilliard on Mortgages, vol. 1, page 163. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State; but the mortgage itself being personal property, a chose in action attaches to the person of the owner. See Story Confl. of Laws, section 379. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property in the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not, they are not the subject of taxation." "When personal property is used by the owner within this State," adds the court, page 549, "it is the proper subject of taxation; as, for instance, a stock of goods owned by a citizen of the State of Illinois, but being offered for sale within the limits of this State,

or a steamboat owned by a non-resident, used upon a river within the State,—such property is the legitimate subject of taxation. The owner in such cases has given to such property a *situs*, and it does not attach to the domicile of the owner, but is within the jurisdiction of the State."

8. It seems, however, to be intimated by Chief Justice Woodward, in Maltby's Case, that the right of the State of Pennsylvania to tax bonds issued by Pennsylvania corporations to non-residents, may be sustained on the ground that the corporations were created by the State, and exist under the protection of her laws. "What would this plaintiff's loan be worth," says he, (page 146, 12 P. F. Smith,) "if it were not for the franchises conferred upon the company by the Commonwealth,—franchises which are maintained and protected by the civil and military power of the Commonwealth? Is it not apparent that the intrinsic and ultimate value of the loan, as an investment, rests on State authority,—that it is the State which made it property, and preserves it as property? Then it would seem that this kind of property, more than any other, ought to contribute to the support of the State government. And I suppose it is upon this ground that the Legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor—itself a creature of the legislative power, and all its functions derived from legislative grant—is so dependent upon the government,—it lives and moves and has its being so entirely by the power of the government,—that not only what it owns, but what it owes also, is thought fit to be taxed, whilst only the possessions of the natural person, and not his debts, are taxed."

Now, it must be remarked, although the act of 1864, under which the tax complained of in this case was *collected*, not *imposed*, is confined in its operation to debtor *corporations*, it is not confined to the collection of the tax on "*corporation loans;*" since it expressly provides for the retention of the tax from interest due by corporations to "*depositors, landholders, or other creditors;*" so that the discrimination suggested by the phrase "*corporation loans,*" used by the Chief Justice, is not to be

found even in the act of 1864. But the act which *imposes* the tax—viz., that of April 29th, 1844—taxes all "money owing by solvent debtors," without discriminating between corporation loans or private debts as objects of taxation; and it is by this act, and by this clause of the act, that the extent and character of the tax must be determined. It is true that the act of May 1st, 1854, is specially relied on in the opinion in Maltby's Case, as imposing the tax which was to be collected under the act of 1864, even if the act of 1844 did not; but, as has already been shown, the act of 1854 was passed expressly to relieve the loans and bonds to which it refers from county or municipal taxation, and not to impose a State tax, or any tax, upon them. This is also clearly shown by the omission in the act of 1854 of any provision in regard to the rate of the tax, the mode of assessment, or the means of collection. Besides, the act of 1854 applies only to certain municipal loans and "bonds or certificates of loan of any *railroad company* incorporated by this Commonwealth;" and hence, if the tax collectible under the act of 1864 is to be found in the act of 1854, and not in that of 1844, it necessarily follows that all the taxes retained under the act of 1864, from interest paid the creditors of banks, canal companies, mining companies, and all other of the numerous corporations in Pennsylvania, excepting only railroad companies, have been illegally retained. It is also said in Maltby's Case, that it would be no very strained construction to bring corporation bonds under the title "public loans or stocks whatsoever, except those issued by the Commonwealth" in the act of 1844. But certainly the debts due by a private corporation, even if they are represented by its bonds, cannot with any propriety of language be styled "public loans." The exception of "those issued by this Commonwealth" seems of itself to indicate that the Legislature used the phrase "public loans" in its ordinary and well-understood acceptation. It will be noticed, too, that the clause just quoted speaks of "public loans or *stocks*;" but if the *stocks* meant were intended to include those of private corporations, why did a preceding clause

specify "all *shares or stock* in any bank, institution, or company now or hereafter incorporated by or in pursuance of any law of this Commonwealth, or of any other State or government?" Moreover, the act of 1864 refers expressly to a tax chargeable against "bondholders or *other creditors;*" and it will hardly be contended that the tax imposed on "public loans" by the act of 1844 was collectible, under the act of 1864, from the holder of a promissory note, due-bill, or ordinary bond given by a corporation, and on which it pays interest.

It seems, therefore, that there is no statutory warrant for the distinction drawn by Chief Justice Woodward between debts due to non-residents by individuals and debts due to non-residents by corporations; but if it were otherwise, it is difficult to see on what theory the authority of the State to tax the latter, as contra-distinguished from the former, could be sustained. If the State protects the franchises and property of a corporation debtor, it also protects the person, the business, and the property of the individual debtor; and if this protection justifies taxation of the creditor in the one case, why should it not in the other? The property of a corporation cannot be said to belong to its creditors in any other sense than in the purely figurative one in which the property of an individual may be said to belong to his creditors; and a creditor of a corporation derives no greater benefit from the protection extended to the business of his debtor, than the creditor of an individual does. The theory that the creditor may be compelled to pay for the protection afforded to his debtor by the laws of the State within which the latter may happen to reside, would seem at the first glance calculated to produce more actual hardships when applied to individual than to corporation debtors; but, practically, the result would be very different, since there can be no comparison, in amount, between the debts due by corporations and the debts due by individuals to foreign creditors.

The concluding sentence of the quotation from Chief Justice Woodward's opinion might possibly be thought to indicate that the *indebtedness* of Pennsylvania corporations was meant to be

the subject of taxation, not as against their creditors, but as against the corporations; but certainly no such idea was intended to be conveyed, since the case before the Supreme Court of Pennsylvania turned entirely upon the legality of retaining the tax from the money due the creditors.

9. The consequences that would result from the practical operation of a theory may fairly be considered in determining whether the theory itself is founded upon correct principles. If it is a principle of general jurisprudence that a debt is property having a taxable *situs* where the debtor resides, it necessarily follows that the extent to which the taxing power of a State may be applied to debts due from its citizens to non-residents can have no limit, except that of the debts themselves. If the State of Pennsylvania can exact five per cent. of the interest due by a Pennsylvania corporation to a foreigner, she can exact fifty or one hundred per cent. of the principal of the debt; and if she can lawfully compel a corporation debtor to pay a portion of his debt into her treasury, she can lawfully compel an individual debtor to pay a portion or the whole of his. "It is admitted," said Chief Justice Marshall, in McCulloch *vs.* The State of Maryland, 4 Wheaton 428, "that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the government itself. In imposing a tax, the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." But the Legislature does act upon its constituents when it taxes the income of non-resident foreigners. They have not "the influence of the constituents over their representatives," referred to by Chief Justice Marshall in the same case; and it is not going too far to say that that influence is not likely to be exerted against the imposition of a tax which relieves the constituents themselves from a burthen which they would otherwise have to bear. Considerations of comity would

avail but little against the material advantages offered by such a system of taxation. Retaliation by other States or sovereignties, if effective, might induce a conviction of its impolicy, if not of its injustice; but other States or sovereignties might not be in a position to retaliate with effect. The State of Pennsylvania would hardly be deterred from taxing the money due by her corporations to citizens of Great Britain, by the levy of a retaliatory tax in Great Britain upon all money due by British corporations to citizens of Pennsylvania. The revenue resulting from taxing the interest paid to British holders of the bonds of the Pennsylvania, the Philadelphia and Reading, and other railroad companies of Pennsylvania, would be an ample equivalent for any diminution of the income derived by citizens of Pennsylvania from British corporations.

But it is especially in a country like ours—composed of so many States independent in sovereignty, but yet so closely connected by the business relations of their citizens—that the evils of this new theory of taxation would be most severely felt. Could New York be expected to submit patiently to taxation by Pennsylvania of "all money owing" by citizens of the latter State to citizens of the former? And yet, as has already been shown, the law of Pennsylvania does tax *all* money owing by solvent debtors, although no special provision has yet been made for collecting the tax from non-resident creditors, other than those who are creditors of Pennsylvania corporations. What would be thought of an attempt on the part of the State of Pennsylvania to hold citizens of New York personally responsible for the payment of taxes assessed on the debts due them by the citizens of Pennsylvania? Suits to enforce such responsibility might be brought in any State court where process could be served on the defendants, or even in this court; and if a tax can lawfully be imposed on the property of an individual, the individual himself may undoubtedly be held personally liable for the payment of the tax.

When we remember, too, that the *choses in action*, the debts due to a citizen, are always taxable in the jurisdiction within

which he is domiciled, the taxation of this species of property in other jurisdictions not only imposes an intolerable burthen upon the tax-payer, but impairs the resources from which the revenue of the State of which he is a citizen is derived. The bonds of corporations of other States form no inconsiderable portion of the wealth of citizens of many of the States; but this wealth may be destroyed by taxation in the States where the business of the corporations is carried on. Nor is such a result at all improbable. Many corporations owe their corporate existence to the concurrent legislation of several States; and if each State should tax the non-resident creditors of the corporation, even at the same rate at which resident creditors are taxed, the accumulation of taxes might well destroy the value of the property taxed. The Philadelphia, Wilmington and Baltimore Railroad Company is chartered by the States of Pennsylvania, Maryland, and Delaware, and its loans are held to a large extent in Massachusetts. Suppose that each of the three first-named States should require a tax of but two per cent. on the par value of the principal of these loans, to be deducted from the six per cent. interest due to the Massachusetts holders, what would be the value of their securities, either to themselves or to the State of Massachusetts? If every State within whose territory one or more of the numerous railroads worked by the Pennsylvania Railroad Company happen to lie, should insist upon its right to levy a tax upon the interest paid by that corporation to its non-resident creditors, as an equivalent for the protection afforded by the laws of the State to the operations of the company, the officers of the company might, after retaining the whole interest from the creditors, be compelled to solve the difficult problem of dividing the whole into parts greater in the aggregate than the whole.

These and other difficulties that might easily be suggested seem to show that the theory of taxation which led to the decision of the court below, and which, as far as known, is not countenanced by judicial decision elsewhere, is utterly impracticable, and confirms the wisdom and justice of the rule laid down by Chief Justice Woodward, in Maltby's Case, that "there must

be jurisdiction over either the property or the person of the owner, else the power (of taxation) cannot be exercised." Page 146. "The power of taxation," said Chief Justice Marshall, in McCulloch *vs.* Maryland, "is an incident of sovereignty, and is coextensive with that to which it is an incident. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident." 4 Wh., page 429.

SECOND.—That the third section of the Pennsylvania act of April 30th, 1864, so far as it provides for the collection of a tax from interest due to citizens and residents of other States, conflicts with the first clause of Section 2, Article IV. of the Constitution of the United States, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

No argument can be necessary to show that if this act does not impose upon the citizens of other States a heavier burthen of taxation than that borne by the citizens of Pennsylvania, it violates the constitutional guaranty just quoted. In the case of Ward *vs.* The State of Maryland, decided by this court at the present term, the right "to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens," is said to be one of the privileges and immunities "plainly and unmistakably" secured and protected by this clause of the Constitution.

The question to be determined, then, is, whether the act of 1864 does really subject the citizens of other States to taxation, from which the citizens of Pennsylvania are exempt.

Prima facie, this would not seem to be so; since the act requires the tax to be collected from all creditors to whom interest is payable by corporations, without regard to their citizenship or residence. But this equality is apparent only; since, unlike the Pennsylvania creditors, the creditors who are citizens of other States receive no equivalent for the taxes which they are

compelled to pay, and are taxed on account of their ownership of property which is neither actually nor legally situate in the State of Pennsylvania. The civil rights of a New York creditor of a Pennsylvania corporation are not protected by the State of Pennsylvania, and why should he be required to contribute a part of the expense of maintaining the government of that State? It is idle to say that the State of Pennsylvania accords to him the right to sue in her courts: a similar right is accorded to foreigners by every civilized community on the face of the earth; but no one ever supposed that non-resident foreigners were thereby rendered taxable under the laws of each community which recognized such a right.

The levy of a tax by the British Government upon either the persons or property of citizens of the United States, as an equivalent for the right of citizens of the United States to sue in the courts of Great Britain, would hardly be submitted to; and yet the wrong done would not be of so aggravated a character as that which would result from the imposition of a tax by the State of Pennsylvania upon the persons or property of the citizens of other States of this Union for the privilege of suing in the courts of Pennsylvania. This must be at once apparent, when it is considered that the Constitution of the United States, in securing to the citizens of each State all the privileges and immunities of citizens in the several States, undoubtedly secures the right to sue in the courts of the respective States; that this right can neither be withheld by any State, nor made the pretext for taxing the persons upon whom it has been conferred, and that citizens of other States are not obliged to pursue their claims to the courts of the respective States in which their debtors reside, but can always have ample remedy in the courts of the United States.

No citizen of Pennsylvania is taxed by the State to support a government from which he derives no immediate or direct benefit. Every dollar which the State collects is, presumably at least, expended for the benefit of her citizens; and the citizens of Pennsylvania themselves determine to what extent and in

what manner the taxing power of the State shall be exercised. These privileges and immunities are denied to citizens of other States when their property is appropriated to pay Pennsylvania taxes. The money collected is not expended for their benefit, and they have no voice in the councils of the State.

It is not of course meant to be contended that the property of non-residents actually within the jurisdictional limits of the State should be exempt from taxation. A citizen of New York has no reason to complain if his real estate or his merchandise in Pennsylvania is taxed to support the government which protects such property. He receives an equivalent for the tax; and if the ownership of the property does not entitle him to representation in the Legislature of Pennsylvania, it is because property in Pennsylvania, no matter to whom belonging, is not entitled to representation. But if it has been successfully shown that a debt due from a citizen of Pennsylvania is neither actually nor theoretically property in Pennsylvania, the taxation of such a debt as against a New York creditor is taxation without protection of either the tax-payer's person or property, and without representation; and no citizen of Pennsylvania is, under such circumstances, taxed by the laws of Pennsylvania.

The oppressiveness of such taxation is palpable, when it is considered that the tax imposed by the law of the debtor's domicile is superadded to that imposed by the law of the creditor's domicile. In the case of Oliver *vs.* Washington Mills, 11 Allen's Reports, page 281, the Supreme Court of Massachusetts, in answer to a suggestion that a special tax on shares held by non-residents of that State in the capital stock of corporations there was not a discrimination in favor of citizens of that State, because resident shareholders were subject to taxation on the value of their shares under the general laws regulating the assessment of taxes, and the shares of non-resident shareholders were not liable to be assessed in the ordinary mode, say, "The fact is so, certainly. But the reason is, that shares in corporations being personal property, follow the person, and are taxable to the owner in the State where he has his domicile. It cannot

be assumed that they are exempt from taxation, or that they are not liable to it, as having a rate of assessment in the place of the residence of the owner, as the shares of resident stockholders are subject to it here." So it may be said, not merely that it cannot be assumed that the bonds or obligations of Pennsylvania corporations held by citizens of other States are not taxable, but that it must be assumed that they are taxable where the holders reside.

THIRD.—*That the State of Pennsylvania has no right to tax citizens and residents of other States; that the assertion of such a right is inconsistent with the principles on which the judicial power of the United States is administered in controversies between the States, or between a State and citizens of another State, and is therefore "repugnant to the Constitution or laws of the United States."*

No argument can be needed to vindicate the correctness of the first clause of the above proposition. The limitation of State jurisdiction, on which it is based, has been repeatedly recognized and enforced by this court. In McMillan *vs.* McNeill, 4 W., 209, it was held that a discharge under the bankrupt or insolvent law of the State of Louisiana, obtained by a debtor who at the time was a resident of that State, had no effect upon a debt which he had contracted in South Carolina before his removal to Louisiana, and that it was immaterial that the law of the latter State was in force when the debt was contracted. In Ogden *vs.* Saunders, 12 W., 214, it was held that a debt contracted in the State of New York by a citizen of New York could not be discharged by the operation of an insolvent law of that State, in force when the debt was contracted, as against a creditor who was a citizen of another State, and who had "never voluntarily subjected himself to the State laws, otherwise than by the origin of his contract." The dissent of three judges, which marked this decision, was certainly not owing to any doubt concerning the territorial limits of State jurisdiction, but simply to the effect which they attributed to the *lex loci contractus*. Baldwin *vs.* Hall, 1 Wallace, 223, reaffirmed the

principle of Ogden *vs.* Saunders, and applied it to the case of a debt not only contracted, but expressly made payable, in the State in which the debtor resided, and where he afterwards obtained his discharge as an insolvent. The judgment in Baldwin *vs.* Hall was concurred in by the whole court: and it certainly must be conceded that the extra-territorial invalidity of State laws is, in the language of Mr. Justice Clifford, one of those things "that ought to be regarded as settled and forever closed."

It would seem plain that the principle on which the above decisions are based applies, *a fortiori*, to State tax laws. The argument that the obligation of a contract should be regulated by the law of the place where the contract was made and where one of the contracting parties resides, and still continues to reside, is certainly not without plausibility. But what can be said in favor of extending the operation of the tax laws of a State to citizens of other States who happen to have debtors residing in the State which imposes the tax? Such a theory has no foundation, either in the practice of civilized nations or in the speculative opinions of juridical writers. In a case already referred to, (Railroad Company *vs.* Jackson, 7 Wallace, 262,) this court denied the extra-territorial operation of the very tax law which is the subject of this controversy. It is true that the decision there was rested upon the ground that the scope sought to be given to the law could not be permitted without "giving effect to the acts of the Legislature of Pennsylvania upon property and interests lying beyond her jurisdiction;" but it will not be contended that the limitation of State jurisdiction which it enforced is not, at least, equally applicable where persons not within the jurisdiction of the State are attempted to be made subject to the extra-territorial effect of its laws. That such is the attempt in the present case, has already been shown.

Assuming, then, that the extra-territorial effect alleged to have been given by the Supreme Court of Pennsylvania to the act in which this controversy originated is inconsistent with the general principles of jurisprudence as recognized and established by

this court, it remains to be seen whether the error complained of can be corrected in the present proceeding.

The question thus presented is simply whether the effect and operation of State laws upon citizens of other States are to be determined by the decisions of the Supreme Court of the United States, or whether the State courts are practically at liberty to disregard these decisions and to follow their own convictions.

The Supreme Court of Pennsylvania has undoubtedly adopted the latter alternative as a correct exposition of the law. The decision in the case of The Pittsburg, Fort Wayne and Chicago Railroad Company *vs.* The Commonwealth of Pennsylvania, reported in 16 P. F. Smith, 73, which is now before this court for review, is an express repudiation of the doctrine established in The Railroad Company *vs.* Jackson. This decision of the Supreme Court of Pennsylvania is selected as an illustration because its conflict with the ruling of this court is unequivocally admitted. "We are met here," said Judge Pearson in delivering the charge to the jury, which was approved by the Supreme Court of Pennsylvania, "by a decision of the Supreme Court of the United States, in the case of Northern Central Railway Company *vs.* Jackson, which very clearly conflicts with all of the cases cited (*i. e.*, decisions of the Supreme Court of Pennsylvania). Jackson sued the railroad company on the coupons due him for interest on his bonds. They were drawn in the usual form, payable to bearer, and the holder was a non-resident alien. The company defended as to the amount of tax paid by it to the Commonwealth of Pennsylvania; but it was not allowed by the court, which held that there could be no apportionment of the tax; that Pennsylvania undertook to collect taxes from claims beyond her jurisdiction; that if she could tax, Maryland could also, which would lead to double taxation; and, as many of the railroads passed through several States, each could impose the same burden, which would be most oppressive. If this case depended on the Constitution of the United States, we should certainly consider ourselves bound by that decision. But, as we understand the subject, it must be controlled by Pennsyl-

vania law alone, &c. * * * * The hardship under which companies labor, situated like the defendant, has been strongly pressed on our consideration. Pennsylvania, through her courts, will compel the corporation to pay the tax, whilst the courts of the United States will oblige it to pay its coupons in full, thus throwing the burden of taxation on the debtor instead of the creditor, as intended by law. We do not think that this clashing of jurisdiction can be of long continuance. It is a settled principle of federal jurisprudence, that when the controversy arises on State laws, the United States court will follow the last decision of the court of final resort in the State. We considered the points raised here already decided by our Supreme Court. The United States court thought otherwise. When they are confessedly settled, there can thereafter be no clashing of jurisdiction. Should the Supreme Court of this State adopt our views, the United States judiciary must conform thereto, unless that court departs from its settled rule on the subject, or declares that the debts due to non residents are protected from taxation by federal laws, in which case our courts must succumb."

It may be remarked here, in passing, that while, except under peculiar circumstances, it may be "a settled principle of federal jurisprudence, that, when the controversy arises on State laws, the United States courts will follow the last decision of the court of final resort in the State," it has never before been supposed that decisions of the State courts extending the effect of State laws to persons or property not subject to State jurisdiction must be followed by the courts of the United States.

On the other hand, we have, in the cases of Scribner *vs.* Fisher, 2 Gray, 43, and Kelley *vs.* Drury, 9 Allen, 27, an unqualified recognition of the binding force of the decisions of the Supreme Court of the United States on the State courts, in questions concerning the extra-territorial operation of State laws. In the former of these cases the decision of the majority of the Supreme Court of Massachusetts was directly contrary

to that afterwards made in Baldwin *vs.* Hale; but at the same time it was expressly admitted that the decisions of this court on questions like that involved in the case were guides to be followed as the highest expositions of the law; and it was only because the point in controversy was supposed to remain unadjudicated by this court, that the decision was made. In the latter case, the ruling in Baldwin *vs.* Hale was at once adopted. "We take the decision in Baldwin *vs.* Hale in the broadest application of its doctrines," say the court, "and give it full effect in the courts of Massachusetts in favor of citizens of another State."

Other cases in the State courts to the same effect might be cited, but it is more important to ascertain what the doctrine of this court has been.

The opinion of Mr. Justice Johnson, in Ogden *vs.* Saunders, concludes with the following summary of the propositions which it was intended to establish:—

"1. That the power given to the United States to pass bankrupt laws is not exclusive.

"2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *multo fortiori*, of posterior contracts.

"3. But when, in the exercise of that power, *the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States.*" 12 Wheaton, 369.

The reasoning on which this third proposition was based is thus stated by the learned judge:—"The question is one partly international, partly constitutional. My opinion on the subject is briefly this, that the provision in the Constitution which gives power to the General Government to establish tribunals of its own in every State, in order that the citizens of other States or sovereignties might therein prosecute their rights under the

jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union, to confine the States in the exercise of their judicial sovereignty to cases between their own citizens, to prevent, in fact, the exercise of that very power over the citizens of other States which the origin of the contract might be supposed to give to each State, and thus to obviate that *conflictus legum* which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive is infinitely more easy to prevent than to adjust." 12 Wh., page 359.

For some reason not easily understood, there appears to have been at one time a doubt as to whether this opinion of Mr. Justice Johnson was really that of the court; but that doubt has long since been set at rest, as will be seen by referring to the opinion delivered by Mr. Justice Clifford in Baldwin *vs.* Hall. In the language of Chief Justice Marshall, in Boyle *vs.* Zacharie, 6 Peters, 348, "whatever principles are established in that opinion, (Ogden *vs.* Saunders,) are to be considered no longer open for controversy, but the settled law of the court."

It would seem to be clear, that the principle of constitutional law established by the third proposition of Mr. Justice Johnson is not that involved in the clause of the Constitution which relates to State laws impairing the obligation of contracts. The State insolvent law, which in Ogden *vs.* Saunders was held inoperative as to contracts made with citizens of other States, was so held, not because it impaired the obligations of contracts, but because the citizens of other States could not be made subject to its provisions. This view of the case was taken by Chief Justice Taney in his opinion in Cook *vs.* Moffat, 5 Howard, 310, where, although concurring in the decision of the court in affirming a judgment of his own in the Circuit Court, he expressed his dissatisfaction with the principles of the cases which he had been constrained to follow on the Circuit, and which he submitted to in the Supreme Court. His opinion concludes with the remark, "that it would be a very unsafe mode of construing the Constitution of the United States, to infer such

a power (*i. e.*, to control or direct the States as to the operation of their own bankrupt laws, or as to the extra-territorial effect of the bankrupt laws of other States) in the tribunals of the General Government merely from the general frame of the Government and the grant to it of judicial power;" but, nevertheless, the weight of authority compelled him to assent to a judgment which was founded upon such a construction. It is worth observing, too, that the law, as Chief Justice Taney would have had it to be, implies that both State courts and the United States courts sitting in the State should follow the same rule as to the effect of State laws on citizens of other States. He does not appear to have recognized the theory that the Supreme Court of a State could decide that the income of a non-resident could be taxed by the State, and that the Supreme Court of the United States could decide directly the opposite, and yet both decisions be law.

But what is the remedy when such a conflict of decision occurs? "The Constitution of the United States," said Mr. Justice Grier, in delivering the opinion of the court in Cook *vs.* Moffat, "is the supreme law of the land, and binds every forum, whether it derives its authority from a State or from the United States. When this court has declared State legislation to be in conflict with the Constitution of the United States, and therefore void, the State tribunals are bound to conform to such decision. A bankrupt law which comes within this category cannot be pleaded a discharge even in the forums of the State which enacted it." 5 Howard, 308. The same rule must hold good in every case of a conflict between a State law and the Constitution of the United States, without regard to the precise point of conflict. Whether the State law violates an express clause of the Constitution,—such as that relating to the obligation of contracts,—or whether, "by acting upon the rights of citizens of other States, there arises a conflict with the judicial power granted to the United States,—which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States,"—it must, in either

case, be disregarded by State as well as federal tribunals. The constitutional rights of the citizens of the United States cannot be made to depend upon the forum in which they are to be adjudicated. The courts of Pennsylvania cannot compel the citizens of other States to pay a tax which this court has declared cannot lawfully be collected. The law which governed the Supreme Court of the United States in the case of The Railroad Company *vs.* Jackson must govern the Supreme Court of Pennsylvania in all similar cases. A principle of constitutional law cannot be affirmed on a writ of error from a State court and denied on a writ of error from a circuit court of the United States. "Our duty," said Mr. Justice Swayne in Butz *vs.* Muscatine, 8 Wallace, 583, "depends on the questions involved, and not upon the channel through which the case comes before us." Where the record of a State court shows that there "is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity," such decision must be reversed by this court on its appearing that the decision of the State court is inconsistent with the principles established by this court in the exercise of its constitutional jurisdiction. The case of Shaw *vs.* Robbins, reported in 7 Curtis, page 226, is a direct authority to the effect that the law administered on a writ of error to a circuit court of the United States will be applied on a writ of error to a State court. "This," said Mr. Justice Johnson in delivering the opinion of the court, "is a contract between a citizen of New York and a citizen of Massachusetts.

It only differs from Ogden *vs.* Saunders in this particular, —that the action was brought in a State court, not the court of New York, but the court of another State. We think that the decision in the case of Ogden *vs.* Saunders applies to this, and must govern its decision."

JAMES E. GOWEN,
For Plaintiffs in Error.

Supreme Court of the United States.

NO. 408 DECEMBER TERM, 1870.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Brief on behalf of Defendant in Error.

F. CARROLL BREWSTER,
Attorney General.
JAMES W. M. NEWLIN,
For Defendant in Error.

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

STATEMENT OF DEFENDANT IN ERROR.

The plaintiff in error is a Pennsylvania corporation. Its whole road lies within the limits of that State. Under the State statutes, as expounded by the Supreme Court of Pennsylvania, in the case of Maltby vs. The Reading Railroad Company, 2 *P. F. S.*, 140, the interest paid on the bonds of this company were held to be subject to a tax of three mills on the dollar, under a general law taxing moneys owned by solvent debtors.

These bonds are secured by a mortgage on the road, and its property and franchises, the whole being in Pennsylvania.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

I. The road, franchises and property of the Delaware, Lackawanna and Western Railroad Company being wholly within the State of Pennsylvania, the case of *Jackson vs. The Railroad Company*, 7 *Wallace*, 266, is not in point, because that was decided on the express ground that the road of the Northern Central Railroad Company extended into Maryland, and the court considered that taxing the interest on the bonds secured by a mortgage on the whole road, was in effect taxing Maryland property, and so it was held void. The case of the Delaware, Lackawanna and Western Railroad Company, therefore, rests on the consideration of the broad question, whether under a general law which does not discriminate between residents and non-residents, the State of Pennsylvania can direct the officers of

the company to retain in their hands, for the State, a tax upon the interest in their hands, which they pay to the holders of bonds issued by them for moneys loaned, which bonds are secured by a mortgage upon property wholly within the State. On this point, *Jackson vs. R. R. Co.*, is no authority. The language is very guarded. It is as follows, Nelson, J.:

"Nor shall we inquire into the competency of the Legislature of Pennsylvania to impose this tax upon general principles, as we shall place the objection upon other and distinct grounds, though we must say, that the tax upon the promissory note or bond, given by the resident debtor, and the withholding of the amount from the interest due to the non-resident holder, would *seem* to be a tax upon such non-residents. It is not a tax of the money lent, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond, which is in the hands of the non-resident holder."

It is submitted on behalf of the State, that this is not a tax on the bond at all, nor on the principal moneys due, but it is a tax on the interest on the bonds, which interest is in the hands of this Pennsylvania company, and therefore, within the jurisdiction of the State. Even if it were directly upon the bond or upon the principal, inasmuch as the same is wholly secured by property exclusively within the State of Pennsylvania, there can be no question that the tax can lawfully be imposed.

Neither is the tax liable to the objection that it acts on property outside of the limits of Pennsylvania, the money, and interest and security therefor being all within the State. Nor is the tax liable to the objection of double taxation, and even if it were, it would still be constitutional. *See State vs. Newark*, 1 *Dutch.*, 317, *Tatem vs. Collector*, 3 *Zabr.*, 429.

On the general question of the conflict of jurisdiction and of the *situs* of the subject matter—See *Story on the Conflict of Laws, (Redfield,)* § 550. "In the next place, let us consider the subject of jurisdiction in regard to property. It will be unnecessary to discuss the matter at large, as to personal property, since the general doctrine is not controverted, that, although movables are, for many purposes, to be deemed to have no *situs*, except that of the domicil of the owner; yet, this being but a legal fiction, it yields, whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it to the same extent that it may exert its authority over immovable property. One of the grounds upon which, as we have seen, jurisdiction is assumed over non-residents, is through the instrumentality of their personal property, as

well as of their real property, within the local sovereignty; hence it is, that whenever personal property is taken by arrest, attachment or execution within a State, the title so acquired, under the laws of the State, is held valid in every other State, and the same rule is applied to debts due to non-residents, which are subjected to like process under the local laws of a State."

II. This case differs in another respect from the case of *Jackson vs. The Railroad Cowpany*, for there the suit was brought by a bondholder against the corporation; here the corporation having retained the tax, refuses to pay it over to the Commonwealth, and so retains it in its own possession.

III. The question, whether the imposition of the tax in dispute, impairs the obligation of a contract between the non-resident bondholder and the corporation, need not be separately considered. If the tax is in itself a lawful one, then the contract must be taken to have been made subject to the power of the State to impose it. The reservation of the taxing power in the charter, is of itself notice to all who may be affected by it.

IV. That the State intended to impose the tax in question, is expressly recognized in *Jackeon vs. R. R. Co.*, so that part of the case is not open. Whether the tax, having been imposed, is legal, has been already considered.

F. CARROLL BREWSTER,
Attorney General.

JAMES W. M. NEWLIN,
For Defendant in Error.

Supreme Court of the United States.

No. 30.

THE DELAWARE, LACKAWANNA AND WESTERN RAILWAY COMPANY,

Plaintiff in Error

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

Defendant in Error.

F. CARROLL BREWSTER,
Attorney General.
JAMES W. M. NEWLIN,
For Defendant in Error.

Supreme Court of the United States.

THE DELAWARE, LACKAWANA AND WESTERN RAILWAY COMPANY,

PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

MOTION TO DISMISS WRIT OF ERROR.

The defendant in error moves to dismiss the writ of error herein for want of jurisdiction. It is submitted that it does not appear from the record that any question was raised and decided so as to give jurisdiction to this court, under section twenty-five of the judiciary act.

BRIEF OF ARGUMENT ON MOTION TO DISMISS WRIT OF ERROR.

The "specifications of objection to the settlement of the Auditor General, etc.," (page one of transcript of record,) are four in number.

The first two specifications raise simply a question of the *meaning* of the State laws, *i. e.*, whether the tax claimed was really imposed thereby. This is a question of construction which belongs exclusively to the State courts.

The third specification alleges that no tax had been assessed on the bonds of the company when the interest was paid upon which the tax is claimed.

The fourth specification is in these words: "Said bonds are *principally* held by non-residents, and are, therefore, not subject to said tax."

Act of Assembly of March 30, 1811—*Purdon's Digest, page* 822, *pl.* 20—which authorizes appeals from settlements "Provided, however, that the appeal * * * be accompanied with a specification of objections to the said settlement."

Porter vs. Commonwealth, 1 *Penna. Rep.* 256.

The appellant is confined to the objections stated in the specification.

9 *Watts & Serg.* 112. 8 W. 57, [illegible] 124.

The settl[illegible]ent is conclusive u[illegible]d from in s[illegible]

It does not state upon what ground the exemption from taxation is claimed, whether the acts of Assembly do not reach the corporation in question or its bonds, or whether the exemption arises under its charter or some other way.

It will be observed that none of these specifications show a question to have arisen and been decided in such manner as to give this court jurisdiction under section twenty-five of the judiciary act.

The settlement (transcript of record, page 3) shows only the amount of the tax, and how apportioned under the act of April 30, 1864. *The apportionment is an error, the whole road being in Pennsylvania.*

The declaration (transcript of record, page 2) is in debt on the settlement.

The plea is "nil debit."

The notes of trial (transcript of record, pages 4–12) contain the evidence which was submitted to the jury.

The Commonwealth offered the settlement and the report of the company on which it was based, and rested. (Transcript, pages 4–5.)

The defence gave in evidence the specifications before referred to. (Transcript, page 6.)

Then follows a history of the bonds and the manner in which they are secured, etc. (Transcript, pages 10–12.)

Depositions of officers of the company. (Transcript, pages 10–12.)

It appears that the whole security for the bonds is in Pennsylvania.

These depositions were offered in order to prove that all the bonds (the interest whereon was taxed) were held by non-residents of Pennsylvania.

Viewed simply as a question of fact, it is submitted that the matter was left in such doubt that a jury might have found for the Commonwealth, on the ground that it had not been clearly shown what part, if any, of the bonds was held by non-residents at the time the tax was levied. It follows that even if a question had been *raised* under section twenty-five of the judiciary act, the verdict and judgment thereon do not necessarily show that question to have been *decided* in such a manner as to give jurisdiction to this court, or to have been decided at all.

Armstrong vs. Treasurer of Athens County, 16 Peters, 285. * * * * "*Fourthly.* It must be entered on the record of the proceedings in the appellate court in cases where the record shows that such a point may have arisen and been decided that it was in fact raised and decided, and this entry must appear to have been made by the order of the court or by the presiding judge by order of the court, and certified by the clerk as a part of the record in the State court." * * * * * * Or, *sixthly*, it must appear from the record "that the question was necessarily involved

in the decision, and that the State court could not have given the judgment or decree which they passed without deciding it."

The Victory, 6 Wallace, 384. The point raised must have been raised and decided adversely to the plaintiff in error to give jurisdiction.

Hamilton Co., vs. Mass., 6 Wallace, 636. Clear and necessary intendment that the question was raised, and must have been decided as claimed is required.

Parmalee vs. Lawrence, 11 Wallace, 36. It must appear by the record that "such a question (*i. e.* one within section 25 of the judiciary act) must be necessarily involved in the decision, and that the State court could not have given judgment without deciding it."

There are no points of charge or prayers for instruction to the jury.

The charge of the court, (transcript, pages 12–15.)

It is contended that the charge of the court is no part of the record for the purpose of giving jurisdiction to this court, and that the record nowhere shows a question to have arisen and been decided so as to give jurisdiction here.

Medberry vs. State of Ohio, 24 Howard, 414. Whether this court has jurisdiction can be ascertained either from the pleadings or by bill of exceptions, or by certificate of the court. But the assignment of errors or the published opinion of the court cannot be reviewed for the purpose.

Armstrong vs. Treasurer of Athens Co., 16 Peters, 285. To give jurisdiction under judiciary act it must appear on the record itself to be one of the cases enumerated in that section, and nothing out of record certified can be taken into consideration. This must be shown, *first*, where by express averment or by necessary intendment in the pleadings in the case: or, *secondly*, by the direction given by the court and stated in the exception; or, *thirdly*, when the proceeding is according to the law of Louisiana, by the statement of facts and of the decision as usually made in such cases by the court; or, *fourthly*, it must be entered on the record of the proceedings in the appellate court, in cases where the record shows that such a point may have arisen and been decided, that it was in fact raised and decided, and this entry must appear to have been made by the order of the court, or by the presiding judge by order of the court, and certified by the clerk as a part of the record in the State court; or, *fifthly*, in proceedings in equity it may be stated in the body of the final decree of the State court from which the appeal is taken to this court; or, *sixthly*, it must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed without deciding it.

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Hoyt vs. Shelden, 1 Black, 519. This court cannot review proceedings of a State court, on the ground that the judgment or decree violates the

Federal Constitution, unless it appears from the record that the point was distinctly raised.

Farney vs. Towle, 1 Black, 350. Point relied upon must have been raised and decided in State court.

Railroad Co. vs. Rock, 4 Wallace, 180. The record must show that some one of the matters mentioned in the twenty-fifth section of judiciary act was necessarily decided by the court, notwithstanding a certificate from presiding judge that such matters were drawn in question.

In *Lawler vs. Walker*, 14 Howard, 147, the court said, in dismissing a case for want of jurisdiction, in which there was a certificate for the State court that, "the twenty-fifth section requires something more definite than a certificate to give jurisdiction. The conflict of the State law with the Constitution of the United States, and a decision by State court in favor of its validity must appear on the face of the record before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for or from exceptions taken to the ruling of the court." To same effect the court also cited *Mills vs. Brown*, 16 Peters, 525.

The Victory, 6 Wallace, 384. The point raised must have been raised and decided adversely to plaintiff in error to give jurisdiction. This need not appear by express averment—enough if *record* shows by necessary intendment that the point was decided.

It is not sufficient that on fuller examination in Supreme Court, United States, with the aid of counsel there, it can be seen that it was a point which ought to have been raised and which might have been decided. "It is not sufficient to show that the question might have arisen or been applicable to the case, unless it is further shown *by the record* that it did arise and was applied by the State court to the case," cited from 10 Peters, 368, with approbation.

Rector vs. Ashley, 6 Wallace, 143. The *opinions* of the State courts (even though required by a statute of the State to be filed among the papers in the case) constituting no part of the record of the cause in which they are given (as the court here decides that they did not) not being looked to for the question decided by those courts, and neither the pleadings in the case nor any other part of the record having raised the question of the statute, this court would not presume that it was in the case.

Walker vs. Villavaso, 6 Wallace, 124. Nothing out of the record certified to court can be taken into consideration. Not allowed to bring before court the fact that the judgment of the primary court affirmed by highest State court was given after the State was in rebellion, (although a fact of which the Supreme Court of the United States would take judicial cognizance,) it not appearing from the record that this want of authority in pri-

mary court under Federal Constitution was drawn in question and decided against below.

Hamilton County vs. Massachusetts, 6 Wallace, 636. It is not sufficient to show that the question might have arisen and been applicable to case in lower court, unless it appears in record that it did arise and was applied by State court in disposing of the controversy.

Clear and necessary intendment that the question was raised and must have been decided as claimed.

Furman vs. Nichol, 8 Wallace, 56. A case arising out of refusal of State of Tennessee to receive bank notes of Bank of Tennessee for taxes, alleged to be in violation of a statute of the State, claimed to be a contract with bank. Mandamus asked to compel tax collectors to receive notes. Jurisdiction objected to.

Held, under twenty-fifth section of judiciary act of 1789, a cause may be removed to S. C. U. S. whenever some one of the questions embraced in it was relied on by the party who brings the cause there, and when that right was denied to him by State court. The particular provision of the Constitution which is claimed to be violated need not be contained in the pleadings, if the record shows by express averment, or by clear and necessary intendment, that the constitutional provision did arise, and that the court below COULD NOT have reached its conclusion and judgment without applying it to case in hand.

Gibson vs. Chouteau, 8 Wallace, 317. This court has decided, in 6 Wallace, 142, and 12 Wheaton, 117, that the opinion of the court cannot be resorted to for the purpose of showing that a question of Federal cognizance was decided by State court.

Argument of counsel cannot be regarded as a part of record of case, having no better claim "than the opinion of court, *which accompanies the record*," to be so regarded.

Worthy vs. the Commissioners, 9 Wallace, 611. Mandamus to compel county commissioners to install plaintiff as sheriff of Moore county, N. C. The defendants refusing to accept him under section 3 of fourteenth amendment of Constitution of United States, because he was sheriff of county before rebellion, and had taken oath of allegiance, and subsequently aided in rebellion.

Defendants moved to dismiss writ of error, as plaintiff in error had not set up below any claim under constitutional laws or authority of United States, but solely under laws of North Carolina.

Held, no jurisdiction, as there was no decision of State court against validity of any treaty or act of Congress or authority exercised under United States, nor in favor of validity of a statute of, or authority exercised under a State alleged to be repugnant to same. Not enough that brief of counsel

set up right under fourteenth amendment, as said right was not set or specially claimed in State court.

Parmalee vs. Lawrence, 11 Wallace, 36. Plaintiffs alleged a contract for sale of real estate for $50,000, and interest at ten per cent., and brought a bill for specific performance. Defendant alleges there was no contract to convey, but a mortgage to secure loan of $50,000, and tendered a re-conveyance on payment of principal and interest, and filed cross-bill for foreclosure. Plaintiff asserted as before, and also set up usurious interest, and claimed the forfeiture under the laws of Illinois.

The record showed that the litigation resulted in a question as to rate of interest under laws of Illinois, and that neither in the pleadings nor evidence, nor at the hearing in superior court, was any question raised as to constitutionality of the State statute regulating interest. This question first raised in Supreme Court on appeal, and a certificate from that court showed it was raised in argument and overruled.

Held, something more than this certificate needed to give jurisdiction under judiciary act.

The conflict of State law with Constitution, and a decision by State court in favor of its validity, must appear on face of record. It must appear in the pleading or evidence, in the instructions asked for, or from exceptions to ruling of court. Such a question must be necessarily involved in decision, and that State court could not have given a judgment without deciding it.

R. R. Co. vs. Rock, affirmed. Nelson, J., after citing language in *Lawler vs. Walker*, 14 How., 152, *R. R. Co. vs. Rock*, 4 Wallace, 177, says: "The "certificate was as full in that case as in the present, but it was the only "evidence of the fact that a federal question had been presented." * * * "We will add if this court should entertain jurisdiction upon a certificate "alone in the absence of any evidence of the question in the record then "the Supreme Court of the State can give the jurisdiction in every case "where the question is made by counsel in the argument."

Insurance Company vs. the Treasurer, 11 Wallace, 204. Mandamus asked to compel county treasurer to refund taxes paid by insurance company upon U. S. certificates of indebtedness, upon ground the taxes were declared illegal by S. C. U. S., and in pursuance of an act of New York Assembly claimed to authorize said return.

Mandamus refused by State courts, upon ground these certificates not exempt from taxation, and appeal to U. S. S. C.

It was claimed for plaintiff in error that the record showed no question, but whether certificates of indebtedness were or were not illegally taxed by State of New York in years 1863–64, the affirmative being maintained by insurance company and denied by treasurer, and that State Courts had de-

cided in favor of latter, thus giving jurisdiction. (The treasurer had not denied the illegality of tax, but insisted it had not been declared so.)

The court, without hearing counsel for defendants in error, *held:* That as it did not appear by the record that the State court had passed on legality or illegality of tax, and as they might have decided the case on the construction of a State statute, that they had no jurisdiction to review the decision of State court.

No opinion of Court of Appeals seems to have been written, at least none appeared. Bradley, J.: "And indeed it (constitutional question) ought to appear from the record, and not from any opinion of the court, that a federal question was raised in order to give this court jurisdiction of the case. For all that appears from the record the decision of the Court of Appeals may have been passed simply on its construction of the State statute." * * * * "Now we have held repeatedly that the construction of State statutes belongs to the State courts, and is not a federal question, which we can revise in a writ of error to a State court."

(*b.*) The charge does not show jurisdiction, even if it is considered a part of the record.

(1.) The questions relied on here are only alluded to *arguendo.* (Transcript, pages 13, 14.)

(2.) There is no bill of exceptions, but merely the following note at the end of the charge:

"To this charge the defendant, by its counsel, did except and at his re-"quest of each this exception sealed." (Transcript, page 115.)

As questions, other than the constitutional one, were considered in this charge, it is impossible to tell definitely what part was excepted to.

(3.) The question involved is one of comity only, and does not come within section twenty-five of the judiciary act.

The assignments of error likewise show no federal question to have been raised and decided. (Transcript, pages 17–21.)

STATEMENT OF THE CASE.

The whole of the road of the plaintiffs in error lies within Pennsylvania; the State levied a tax of three mills on the dollar of the bonds of the company, and required that amount to be retained by the company from the interest, and to be paid into the State Treasury.

The act of April 30, 1864, section 2, (pamphlet laws of Pennsylvania, 218,) directs that officers of corporations which pay interest to their depositors, bondholders or other creditors, "upon which, by the laws of this Commonwealth, a State tax is imposed, shall, before payment of the same, retain from said depositors, bondholders or creditors the amount of State

tax imposed by existing laws, and shall pay over the same to the State Treasurer."

The act of April 29, 1844, section 32, (pamphlet laws, 497,) provides that "all real estate, * * * * also all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, * * * * and all public loans or stocks whatsoever, except those issued by this Commonwealth, * * * * shall be valued and assessed to taxation for the purposes in this act mentioned, and for all State and county purposes whatsoever."

Section 34 of the same act, fixes the amount of the tax at "three mills on every dollar of the value thereof."

The Supreme Court of Pennsylvania decided that under these acts (1844 and 1864) the tax claimed by the State must be retained by the company and paid into the State Treasury.

It is contended here by the plaintiff in error:

1. That the Pennsylvania acts do not authorize the collection of this tax.

2. That nearly all the bonds are held out of the State, that they are *choses in action* and follow the domicile of the non-resident owner; that they have no *situs* in Pennsylvania, and the interest payable on them cannot be taxed there.

3. That the acts of Assembly are unconstitutional as being laws impairing the validity of a contract, *i. e.* the engagement of the company to pay a fixed rate of interest to its bondholders.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR.

I. *As to the first objection, viz: That the acts of Assembly of Pennsylvania do not authorize the tax claimed thereunder*—it is a sufficient answer to say that the State courts have decided that these acts do impose the tax, and this being a question of the construction of State statutes the Supreme Court of the United States is bound by their decisions. Besides this court has expressly recognized the construction so put upon these statutes in the case of *Railroad Company vs. Jackson*, 7 Wallace, 266. Mr. Justice Nelson delivering the opinion of the court, said: "It has been argued for the plaintiff, that the acts of the Legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject; for, it is not to be denied, as the courts of the State have expounded these laws, that they authorize the deduction, and, if no other objection existed against the tax, the defence would fail."

The following authorities are referred to on this point:

M'Keen vs. Delancey's Lessee, 5 Cranch, 32–3. Under act of 1715 of Pennsylvania, requiring deeds to be acknowledged before a justice of

peace of county where lands lie, it had been an established practice to acknowledge deeds before a justice of the Supreme Court, although the act of 1715 did not authorize such a practice. This was held to be a correct exposition of the statute as it had long prevailed, and as such binding on the Supreme Court of the United States.

CH. J. MARSHALL.

Elmendorf vs. Taylor, 10 Wheaton, 160. This court respects the decisions of the State courts upon their local statutes, in same manner as the State courts are bound by the decisions of this court in construing the constitution, laws and treaties of the Union.

The courts of every government have the exclusive authority of construing its local statutes, and their construction will be respected in every other country.

CH. J. MARSHALL.

The language of the Chief Justice is very strong in this case on this point, and others. It involved a question of title to real estate, yet the judge makes no distinction in his opinion, but includes all *statutes* in his declaration as to the binding force of local construction.

Shelby vs. Guy, 11 Wheaton, 361. The words "beyond seas" in statute of limitation construed according to decision of the State court. Although the same words may have received different construction in different States, "a fixed and received construction by a State in its own courts makes a part of the statute law."

Jackson vs. Chew, 12 Wheaton, 153. A case of adoption of local law of real property. This court adopts such local laws, whether founded upon construction of statutes of State or upon the unwritten law.

Bell vs. Morrison, Peters, 359–60. A question of construction of statute of limitations of Kentucky. The statute substantially same as that of 21 James, ch. 16, with exception of substitution of five years for six. The English decisions were produced to illlustrate true construction of statute. The court held them not to be conclusive authority. "If, therefore, upon examination it shall be found that the doctrines of the Kentucky courts, upon this subject, are irreconcilable with those deduced from the statute of James, this court would, in conformity with its general practice, follow the local law and administer the same justice which the State court would administer between the same parties."

JUSTICE STORY.

Green vs. Neal's Lessee, 6 Peters, 291, construes statute of limitations of Tennessee according to latest decision of its Supreme Court over ruling, Wheaton, 476, and 2 Peters, 241, because the Supreme Court of Tennessee has finally decided the construction adversely to them, a rule of real property.

Nesmith vs. Sheldon, 7 Howard, 818. A question under constitution of Michigan, arising out of incorporation of a banking company, without necessary two-thirds vote in Legislature. The court held the act of incorporation void, because "the Supreme Court of State had so construed its constitution, and it is the established doctrine of this court that it will adopt and follow the decisions of the State courts in the construction of their own statutes where that construction has been settled by the decision of their highest judicial tribunal."

CH. J. TANEY.

Rice vs. Railroad Company, 1 Black, 359. In ascertaining the meaning or effect of a State statute the rules of construction are borrowed from the common law, except in cases where the courts of the State have otherwise determined.

Sumner vs. Hicks, 2 Black, 533. An assignment for benefit of creditors held void by State court under its act of Assembly. "In cases like this, involving the construction of a State statute, this court is governed by the judgment of the highest judicial authority of the State."

Leffingwell vs. Warren, 2 Black, 599. A real estate title case, statute of limitations pleaded, held. The courts of United States bound to recognize statute of limitations by judiciary act. "The construction given to State statute by highest judicial tribunal of such State is regarded as part of statute, and is as binding on the courts of United States as the text. If the highest judicial tribunal of the State adopt new views as to the proper construction of a statute and reverse its former decisions, this court will follow the latest settled adjudications."

Christy vs. Prigeon, 4 Wallace, 197. Land title case. The interpretation within the jurisdiction of a State of a local law becomes part of that law, as much so as if incorporated in the body of it by the Legislature. If different interpretations are given in different States to a similar law, that law, in effect, becomes, by interpretations, so far as it is a rule for action by this court, a different law in one State from what it is in another.

Gut vs. State, 9 Wallace, 35. The decision of the highest court of a State, that an act of the State is not in conflict with a provision of its Constitution is conclusive upon this court.

Insurance Co. vs. Treasurer, 11 Wallace, 204. "We have repeatedly held that the construction of State statutes belongs to the State courts, and is not a federal question, which we can revise in a writ of error to a State court. It is true, if a State court gives such a construction to a State statute, as to make it conflict with the Constitution or laws of United States, and sustains its validity after giving it such construction, and thereby deprives a party of his rights under the said Constitution or laws, then a

insurance company and denied by [illegible]

federal question is raised, and we can review the decision on the point of the validity of the statute."

The two following cases have been cited by the plaintiff in error as limiting this rule, but it will be seen that, on the contrary, the general rule is strictly upheld by them:

Gelpecke vs. City of Dubuque, 1 Wallace, 206. It is the settled rule of this court, in the construction of State statutes and State constitutions, to follow the decisions of the highest State courts; but there have been heretofore, in the judicial history of this court, many exceptional cases, as doubtless there will be hereafter. In this case there were early decisions of State court overruled by late ones, and the earlier decisions were held right and later ones disregarded, the court saying, "It is insisted the court should follow the latest adjudication in cases involving construction of State statute, or constitution should be followed. * * * * * It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier cases are sustained by reason and authority, and are in harmony with adjudications of sixteen States of the Union." So this was evidently one of the "exceptional cases" mentioned in opinion of court.

Justice Miller dissented, page 210. "The general principle is not controverted by the majority, that to the highest courts of the State belongs the right to construe its statutes and its Constitution, except where they may conflict with the Constitution of the United States, or some statute or treaty made under it."

"But while admitting the general principle thus laid down, the court says it is inapplicable to the present case, because there have been con-
"flicting decisions by the Supreme Court of Iowa on this very point, &c."

Page 214.—Can see no difference between rule of property and a matter of contract, so far as this question goes.

Page 220.—The step taken by this decision "is a usurpation of the right which belongs to the State courts, to decide as a finality upon the construction of State constitutions and State statutes."

Butz vs. City of Muscatine, 8 Wallace, 575.—Where a question involved in the construction of a State statute affects those remedies of creditors which are protected by the Constitution of the United States, this court will use its judgment on the meaning of a statute, regardless of the decisions of the State court.

Page 584.—"If the construction ultimately given to the statute had preceded the issuing of the bonds, and become the settled law of the State before that time, the case, as regards this point, would have presented a different aspect."

Miller, J., and Chase, C. J., dissented.

III. For the defendant in error it is contended that the place of residence of the bondholders is immaterial. The tax does not discriminate against non-residents, and further it is levied neither on the security—the road—nor on the *chose in action*—the bond—but upon the interest payable by the defendant, a Pennsylvania corporation, which it is directed to withhold and pay to the State. This interest money is in the actual possession of the corporation, and it is undeniable that it might be made a garnishee and the money be attached in its hands by the creditors of the bondholders. Even if the tax were directly upon the *chose in action* the proposition advanced by the plaintiff in error, that the thing taxed has no *situs* of its own, but follows the domicile of the non-resident holder and cannot be taxed elsewhere, is founded on a fiction of law which the authorities abundantly show is not applicable to the questions of taxation. This fiction is only intended for the convenience of transfer and for distribution in the settlement of decedents estates. It prevails even in these cases only when not inconsistent with the local laws. The taxing power is an inherent attribute of sovereignty, and operates whenever either the person or the thing is within the jurisdiction.

In this case the thing—*i. e.* the interest money—has a tangible *situs* in Pennsylvania, and can be taxed there, and the State may compel the corporation to act as its agent in the collection of the tax.

In *R. R. Co. vs. Jackson*, 7 Wallace, 266, this court expressly declined considering this question. Mr. Justice Nelson there said: "Nor shall we inquire into the competency of the Legislature of Pennsylvania to impose this tax, upon general principles, as we shall place the objection upon other and distinct grounds, though we must say that the tax upon the promissory note or bond, given by the resident debtor, and the withholding of the amount from the interest due to the non-resident holder, would seem to be a tax upon such non-resident. It is not a tax of the money lent, because that belongs to the resident debtor, for which he is taxable; it is a tax on the security, the bond, which is in the hands of the non-resident."

The following authorities fully sustain the positions assumed here for the defendant in error:

See *Story on the Conflict of Laws*, (Redfield,) § 550. "In the next place, let us consider the subject of jurisdiction in regard to property. It will be unnecessary to discuss the matter at large, as to personal property, since the general doctrine is not controverted, that, although movables are, for many purposes, to be deemed to have no *situs*, except that of the domicil of the owner, yet, this being but a legal fiction, it yields, whenever it is necessary, for the purpose of justice, that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is

actually situate has an entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer, and subject it to process and execution, and provide for and control the uses and disposition of it to the same extent that it may exert its authority over immovable property. One of the grounds upon which, as we have seen, jurisdiction is assumed over non-residents, is through the instrumentality of their personal property, as well as of their real property, within the local sovereignty; hence it is, that whenever personal property is taken by arrest, attachment or execution within a State, the title so acquired, under the laws of the State, is held valid in every other State, and the same rule is applied to debts due to non-residents, which are subjected to like process under the local laws of a State."

Green vs. Vanbuskirk, 7 Wallace, 139. "But this fiction (*i. e. situs* personal property) is by no means of universal application, and as Judge Story says, "yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined;" * * * * and always yields to "laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile." If New York cannot compel the personal property of Bates (one of her citizens) in Chicago to contribute to the expenses of her government, and if Bates had the legal right to own such property there, and was protected in its ownership by the laws of the State; and as the power to protect implies the right to regulate, it would seem to follow that the dominion of Illinois over the property was complete, and her right perfect to regulate its transfer and subject it to process and execution in her own way and by her own laws."

National Bank vs. Commonwealth, 9 Wallace, 360. "But it is strongly urged that it is to be deemed to be a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders, whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it, does not prove that the tax is anything else than a tax on shares. It has been the practice of many of the States for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common, if not the only mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholders contribution to local or municipal taxation is thus collected by the State of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the State it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. If the State

cannot require of the bank to pay the tax on the shares of its stock it must be because the Constitution of the United States or some act of Congress forbids it. There is certainly no express provision of the Constitution on the subject."

"*St. Louis vs. Ferry Company*, 11 Wallace, 428. The controversy relates to taxes imposed by the city upon the ferry-boats of the defendants, used in conveying freight and passengers across the Mississippi river between the city of St. Louis and the opposite Illinois shore. The company was required to pay a specific sum for a license, and a tax was imposed upon its wharf-boat attached to the city landing. Both were duly paid. Payment of the taxes upon the ferry-boats was refused, and the several suits consolidated into the one before us were instituted by the city to recover the amount claimed to be due.

"In the jurisprudence of the United States, a corporation is regarded as in effect a citizen of the State which created it. It has no faculty to emigrate. It can exercise its franchises extra-territorially, only as far as may be permitted by the policy or comity of other sovereignties. By the consent, express or implied, of the local government, it may transact there any business not *ultra vires*, and "like a natural person may have a special or constructive residence, so as to be charged with taxes and duties or be subjected to a special jurisdiction." It is for the local sovereign to prescribe the terms and conditions upon which its presence by its agents, and the conducting of its affairs, shall be permitted.

"It has been said that the power of taxation for the purposes of the Commonwealth is a part of all governmental sovereignty, and is inseparable from it. It is for the Legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportions and by what processes and instrumentalities taxes shall be assessed and collected. The authority extends over all persons and property within the sphere of its territorial jurisdiction. When called into activity there can be no limit to the degree of its exercise, except what is found in the wisdom of the law making power, and the operation of those conservative principles which lie at the foundation of all free government.

"Where there is jurisdiction neither as to person nor property the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.

"In the eye of the law personal property for most purposes has no locality. *Mobilia sequutur personam; immobilia situm. Mobilia non habent sequelam.* In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power, in the locality where the property has its actual *situs*, and the requisite legislative jurisdiction exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation. Whether the personal property of a resident of one State, situate in another, can be taxed in the former, is a question which in this case we are not called upon to decide.

"Upon looking into the enactments under which the taxes in question were assessed, it is obvious that their purpose was not to tax the property through the proprietor, but to tax the things themselves by reason of their being 'within the city.' The point for us to decide, therefore, is whether they are covered by legal provisions under which the taxes were imposed. If the taxing officer acted without authority, the taxes were invalid, and the city is not entitled to recover in this action.

"The boats were enrolled at the city of St. Louis, but that throws no light upon the subject of our inquiry. The act of 1789, section 2, and the act of 1792, section 3, require every vessel to be registered in the district to which she belongs, and the fourth section of the former act and the third section of the latter, declare that her home port shall be that at or near which her owner resides. The solution of the question, where her home port is, when it arises, depends wholly upon the locality of her owner's residence, and not upon the place of her enrolment.

"The company has an office in Illinois. Its minor officers, such as engineers and pilots, lived in Illinois, where its real estate, including a warehouse, was situated. The company had also an office in St. Louis. Its president and vice president and other principal officers lived in the city, and there the ordinary business meetings of the directors were held, and the corporate seal was kept. The court found that the boats, when not in actual use, were laid up by the Illinois shore, and were forbidden by a general ordinance of the city of St. Louis, regulating ferries and ferry-boats, to remain at the St. Louis wharf or landing longer than ten minutes at a time. A tax was paid upon the boats in Illinois. Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum

of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of that State, and from the inherent law of its nature, could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property. Hence they were beyond the jurisdiction of the authorities by which the taxes were assessed, and the validity of the taxes cannot be maintained. In our opinion, the facts found are sufficient to support the judgment."

Denning Duer vs. Small, 7 *Am. Law Reg., p.* 500, *et. seq.:* Statute of New York, that all persons doing business in the State should be taxed upon their capital invested, and that *non-residents* shall be so taxed the same as if they were residents.

It was objected that personal property has no *situs* but that of its owner's domicil, and in this case, the latter being a resident of New Jersey, the tax could not be collected. Held, the tax was lawful.

Iugersoll, J., (U. S. C. C. Southern Dist. of N. Y.,) page 501: "The property of a non-resident within the limits of a State, no matter whether the property be real or personal, and no matter where the owner has his domicile, is equally protected by the laws with the property of the resident. There would appear, therefore, to be no good reason why it should not equally pay in taxes for such protection." * * * * "The laws of the State, by virtue of which the taxes complained of were imposed, declare that all personal estate invested by a non-resident owner in business within the State, (and who by such investing calls upon the State for protection to such property,) shall be assessed and taxed the same as if it were invested by residents, * * * * * pp. 502–3. If a non-resident does not like to pay for such security and protection, he can withdraw his personal property from the State, and thus free himself from such payment. There is no law which compels him to put his property under the protection of the laws of a State of which he is not a citizen or a resident. But while he asks and demands protection from the law, there is no good reason why he should demand that the property of the resident should pay for it; and there is no higher law of the United States which gives a non-resident a right to demand that the property of the resident citizen should pay for the protection afforded by the laws to the property of the non-resident. The equal immunities and privileges secured to the 'citizens of each State" within the 'several States,' does not demand such a requirement as this. * * * * The chief reason urged why personal estate is not subject to the same rule (as real estate) is, that the rule of law is that personal estate follows the person of the owner, and that therefore it may be taxed in the

State where the owner is domiciled. There is no allegation in the bill that the personal estate of the complainant, invested by him in business within this State, has been taxed in New Jersey, the State of his domicile. But if it were so taxed, it would not follow that it could not be taxed in the State where it actually was, and where protection was actually afforded it. If a non-resident owner of real estate should be taxed in the State of his domicile, on an assessment of what he was worth, which should include the value of the real estate which he owns in another State, or if he should be assessed upon his income, which included the rent of such real estate, that would be no good reason why the State in which the real estate was, and which actually affords the protection of its laws to it, and by which protection he would be able to receive rent, should not have the right to compel such real estate to contribute to the expense and cost of such protection actually afforded."

"Bank stock is personal estate. According to the rule of law, it follows, with other personal property, the person of the owner. Such stock, whether owned by a resident or non-resident, is usually taxed in the State where the bank is located. It is believed that laws taxing such stock are not obnoxious to the charge of being opposed to any constitutional law, either State or national. It would seem to be enough that the property of a non-resident, whether that property be real or personal, should be put upon an equality in respect to taxation with the property of a resident, without requiring that it should have greater privileges." Cites *Catlin vs. Hull*, 21 Vermont, 152.

Catlin vs. Hull, 21 Vermont, 152. Debts due from solvent debtors upon promissory notes, are personal estate within the statutes of this State.

In this case, one H., who resided in New York, owned certain property, consisting of debts due from solvent debtors, resident in this State, evidenced by promissory notes; and he appointed the plaintiff, who was also a resident of this State, his agent, to control and manage the property, and collect and re-loan from time to time, as he should think proper, and allowed the plaintiff a specified salary for so doing. And it was held that the Legislature of this State had power to enact a law, subjecting property so situated, to taxation, and that the property was taxable under the statute of October 30, 1844, and that it was property set to the list of the plaintiff as "agent" of H., in the town in which plaintiff resided.

Catlin vs. Hull, 21 Vermont, page 158: "It is insisted upon, * * * that the property of Hammond, of which the plaintiff has the care, as his agent, cannot be considered as legally existing in this State, and that this is an attempt to tax property when neither the property nor the owner is within the State, and within the jurisdiction of our laws. We think, how-

ever, that this doctrine is quite too refined and artificial to be put to any practical use."

Page 159: "But it is insisted further, that provided this property is to be considered as having its actual locality in this State, yet that personal chattels, and especially debts due, having no fixed *situs*, follow the person of the owner, and are considered as being legally situate where the owner has his *domicile;* and from this it is argued that personal estates, and especially debts, cannot be taxed by the State within whose jurisdiction they actually exist, if the domicile of the owner be elsewhere. It is undoubtedly true that by the general acknowledged principles of public law, personal chattels follow the person of the owner, and that upon his death they are to be distributed according to the law of his *domicile*, and in general, any conveyance of chattels, good by the law of his own *domicile*, will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce, and to enable persons to dispose of their property at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact, which contravenes the law of his domicile, for if there is, the law of the owner's domicile must yield to the law of the State where the property is in fact situate. We do not consider this doctrine in relation to the *situs* of personal chattels, and relating to its transfer and distribution, as at all conflicting with the actual jurisdiction of the State where it is situate, over it, or with their right to subject it, in common with other property of the State, to share the burthen of the government by taxation. Judge Story, in his 'Conflict of Laws,' page 19, says: 'The first and most general maxim or proposition is that which has been already adverted to, that every nation possesses an exclusive sovereignty and jurisdiction within its own territory. The direct consequence of this rule is, that the laws of every State affect and bind directly all property, whether real or personal, within its territory, and all persons who are resident within it, whether natural born subjects or aliens, and all contracts made and acts done within it.' * * * Judge Story, in the same work, page 462, expressly states that the doctrine that the *situs* of personal property follows the *domicile* of the owner, is subject to this jurisdiction and right of the State, where the property is situate in fact. Chief Justice Marshall, in *M'Cullough vs. Maryland*, 4 Wheaton, 420, expressly recognizes this doctrine of dominion and sovereignty in the State, and further, that as a necessary incident to such sovereignty, and co extensive with it, is the power of taxation. Chancellor Kent also recog nizes this doctrine to the fullest extent. 1 Kent, 426.

Hoyt vs. Tax Commissioners, 23 N. Y., 226, 230, *p.* 232–3: "The possession of chattels is never vacant, as may be the case in respect to land. Where it is not in the hands of the owner it is usually held by some one else under some agency or trust, and the statutes which have been referred to are comprehensive enough to reach it in most cases when actually situated here, notwithstanding the foreign domicile of the general owner. All personal estate within the State, in the possession or under the control of a trustee, while the beneficial owner is a resident abroad, and in such a case, the assessment is to be against the person having the special interest or control. The actual *situs* and control of the property within the State is the condition which subjects it to taxation. The owner will of course be assessed if he resides here, and has it under his own control. If he resides in another State, the result is reached by charging his agent or trustee in the actual possession. And thus the different provisions of law which have been mentioned, appear to me to be in harmony with each other."

Page 236: "Thus we have a system apparently symmetrical and complete, according to which all personal estate, having an actual *situs* in this State, is brought within the sphere of taxation, without regard to the domicile of the owner, with only special exceptions dictated by policy of justice. And if this be the rule of taxation were the *situs* of the thing to be taxed, and the domicile of the owner are different, it is conceded that the opposite rule cannot and does not prevail. Proceeding on this rule, Louisiana and New Jersey very justly imposed a share of their public burdens on the property of the relator, situated in those States. The State of New York will do the same thing in respect to citizens of those States having property here, but it is not so unjust to its own citizens as to load them with double burdens, by proceeding on the opposite principle. Also, I am confident there is nothing in all our legislation which affords any ground for imputing to it such inconsistency and injustice."

Page 239: "The cases which I have referred to were determined by the highest courts in five States of the Union. They appear to be entirely pertinent to the question now before us, and I am not aware of a single decision to the contrary, except the one under review. These cases not only establish a construction of statutes framed like our own, but they all assert the principles of taxation, which lie at the very foundation of the subject. See, also, Story's Confl. of laws, pp. 19–462.) My conclusion, therefore, derived, from the statutes, from these authorities, and from the reasons of a general nature which ought to influence the decision of such a question, is that the relator was not subject to taxation for his personal estate, having an actual situation in New Jersey and Louisiana."

City of Albany vs. Mlkin, 3 Ind., 481: The share of the part owner of a steamboat, which runs on the Ohio and Mississippi rivers, and occasion-

ally touches at the city of New Albany, in the course of her voyages, is not liable to be taxed under the charter of said city, merely from the fact that such part owner is a citizen of that place.

The *situs* of personal property for the purposes of taxation does not follow the domicile of the owner.

Perkins, J.: "We do not think that for the purpose of taxation, a court is authorized to apply the rule of governing the personal estate of deceased persons, which regards its *situs* as following the domicile of the owner."

Faxton vs. M'Cosh, 12 Iowa, 529: Interest of non-residents in a railroad company in this city may be taxed here.

Sprague vs. Lisbon, 30 Conn.: Machinery (being personal property) in a mill in this State, can be taxed though owned by a non-resident.

Taylor Admr. vs. St. Louis County Court, 47 Missouri, 590, *Syllabus*, 2 *Revenue—Bonds taxed according to the situs of the property and not the domicile of its owner.*—Bonds of the "Masonic Hall Association" of St. Louis, in the hands of an administrator in St. Louis, are subject to taxation in this State, although the deceased owner of the bonds, at the time of his death, resided in Illinois, and the bonds had been once assessed in that State, and were only transferred to Missouri for the purpose of auxiliary administration. The actual *situs* of personal property, and not the domicile of its owner, determines under the law of what State it shall be taxed. Section 24, page 115, Wagn. Stat., providing that real estate shall descend according to the laws of its situs, and personal property shall be distribited according to the laws of the domicile of the decedent, has no application to the case under consideration. In no sense can it be said that the property represented by these bonds was in the possession of a foreign administrator, and it is immaterial that the bonds may have been transmitted from such foreign administrator for the purpose of auxiliary administration.

Such bonds are not exempt from local taxation on the ground that the law makes no special provision for taxing such securities. Under our law bonds are left to be taxed like other property, where they can be reached, except that if the owner resides in the State they shall be taxed in the county of his residence.—Wagn. Stat., 116, § 9.)

Bliss, J., page 600: "Our statute makes no special mention of this description of property, but provides that taxes shall be levied 'on all property, real or personal, except, &c.' * * * * * The county authorities defend their assessment, as we have seen, upon the ground that these bonds are actually within the State, and subject to its laws, while the relator claims that as personal property as especially as *choses in action* they follow the domicile of the owner, and can only be taxed at the place of

such domicile. It is evident they should not be assessed in both States, though an erroneous assessment in one State will not exempt them from a correct one in the other. We have no statute specially subjecting to taxation the bonds of our corporations wherever owned, and if they are liable at all, it is because they are here protected by our laws, and subject to the juristiction of our courts.

"That the *situs* of personal property is the domicile of its owner is a fiction, though color is given to its truth by the law in relation to the distribution of personal estates. If a citizen and resident of St. Louis own a farm in Illinois, no one pretends that the farm has any different location than if the owner lived upon it. But how with the cattle in its fields and stables, and the corn in the graneries? On what principle can they be said to belong to Missouri, so long as they are upon the farm? There is this difference, they can be removed to Missouri, while the farm cannot, but until removed, their *situs* is the farm, and help to swell the wealth of the locality, they are protected by its laws, and should be subject to its burdens. The same rules should be applied to bonds and notes, though from the different nature of the property, their actual *situs* may be more doubtful. But if it be established, although not the residence of their owner, the same result should follow as to them. Thus, if money be left by a non resident in the hands of an agent for investment and loan, the money itself, the instruments taken for it, and the various forms which it assumes, so long as they remain in the hands of such agent, are local property, and upon every principle should be subject to the public burdens imposed upon other local property of the same kind. What difference does it make in benefits derived by the owner from the protection afforded this property by the administration of the law, whether he live near it or abroad? or what difference in the expense of such protection?

"This view has been recognized by all the courts, but I will refer to only a few cases. In Catlin vs. Hall, 21 Verm., 152, one Hammond was a resident of New York, and had placed promissory notes in the hands of the plaintiff in Vermont, as his agent, to collect, re-loan and manage for his benefit. They were assessed at the locality of the agent, and he brought suit to test the legality of the assessment, which was fully sustained by the court, upon the principle that the property was invested in the State, under the protection of the laws, and should contribute to the support of the government which protects it. In the People vs. Home In. Co., 29 Cal., 533, certain State bonds had been deposited by the defendant, a foreign corporation, as security for its liabilities, and were subjected to local taxation. The assessment was sustained, the court holding "the actual *situs* and control of the property within the State to be the condition which subjects it to taxation." The case of Hoyt vs. Commissioners of Texas, 23, N. Y., 224,

arose out of an attempt to assess taxes against the owner, who was a resident of New York, upon his personal property in New Orleans. The court of appeals held the assessment as to tangible property to be illegal, but declined to give an opinion in regard to choses in action. But in the Supreme Court, in the People vs. Gardner, 51, Barb., 352, it was held that a resident of New York was not liable to be assessed and taxed at his residence, upon securities taken and held by his agents in other States. This court, so far as the question has come before us, has sustained the same view, and in St. Louis vs. Wiggins Ferry Co., 40 Mo., 580, Judge Holmes thus states the general doctrine. "The property of either a resident or non-resident is taxable here, if it be found situate within the local jurisdiction, whether it be in the hands of the owner himself or of his agents. The only question then to be determined is, whether the bonds belonging to the relator as administrator, are so located in Missouri as to be taxable here, or whether they should be assessed at the residence of the deceased. The fact that they have been once assessed at the latter place, cuts no figure for the authorities as the true *situs* cannot be thus deprived of the jurisdiction." In regard to the law governing the disposition of the property of a deceased person, our statute provides (Wagn. Stat., 115 ch. 125, § 24,) that real estate shall descend according to the laws of its *situs*, and that personal property shall be distributed according to the laws of the domicile of decedent, thus embodying the existing law, rather than declaring a new rule. The provision, it is claimed, should govern the location of the personal property of the estate, for the purpose of taxation. If so, the rule should apply to all kinds of personal property, so that cattle, horses, steamboats and building upon leased ground, that may never have been within the jurisdiction of the State, containing the domicile of decedents, could be alone taxed at that place. But the law upon this subject has no application to the question under consideration. In fixing the rights of distributees of property, whose *situs* is changeable, and may be under one jurisdiction at one time and elsewhere at another, the law of some locality must be chosen, and it is very proper to govern its distribution by the law known to the deceased. But the principles governing the question of taxation are, as we have seen, very different, and we are only required to ascertain the actual location of the property at the time of assessment.

"Administration of so much of the estate of a non-resident as is found within our jurisdiction is auxillary, in that it becomes the duty of the administrator to submit to the representative of the estate of the domicile any balance remaining after full administration. Yet, so far as local creditors and local distributees are concerned, the administration is complete. Until such balance be transmitted the local administrator has full possession of all the property, and the foreign administrator has no right to inter-

meddle. In no sense can it be said to be in the possession of the foreign administrator, and it does not matter whether or not it may have been transmitted, or rather the evidence and representation of it in the shape of bonds and notes, from such administrator to the local one. When transmitted for the purpose of administration it becomes a local estate, it comes within the jurisdiction of the tribunals of the domicile of the local administrator, it seeks the protection of its laws and the enforcing process of its courts, and until the closing up of the local administration it can have no other *situs*."

People vs. Home Insurance Company, 29 Cal., 593. Personal property in California belonging to a non-resident, may be assessed to such owner, notwithstanding he is a non-resident. If personal property in this State, belonging to a non-resident, is in the possession of a trustee or agent, it may properly be assessed to the agent or trustee in possession, 23 N. Y., 225, cited and approved—*Catlin vs. Hull*, 21 Vermont, 156, and *Hoyt vs. Com. Taxee*, p. 538. *Sawyer, J.*: "But it is claimed that these bonds (i. e. bonds of the State of California, owned by the Home Insurance Company, a New York corporation, and deposited with a banker in California as security for persons dealing with the company in that State) are mere evidences of debt, having no intrinsic value, that they are mere representatives of a debt owned in New York; that they have no *situs* apart from the domicile of the owner, which is located without the State, and that, therefore, they do not constitute property within this State. It is true, as a general principle, that personal property follows the owner, having no *situs* apart from the owner, and is subject to the law of his domicile; but this is a fiction of law adopted for the purposes and incidents of contracts and descents. It may still, for the purposes of taxation and judicial proceedings, be affected by the law of the place where it is in fact situate. This general principle applies to all personal property, whether corporeal or incorporeal. Story says: 'In the next place let us consider the subject of jurisdiction in regard to property. It will be unnecessary to discuss the matter at large as to personal property, since the general doctrine is not controverted, that although movables are, for many purposes, to be deemed to have no *situs* except that of the domicile of the owner, yet, this being but a legal fiction, it yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined. A nation within whose territory any personal property is actually situate, has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there. It may regulate its transfer and subject it to process and execution, and provide for and control the uses and disposition of it, to the same extent that it may exert its authority over immovable property. One of the grounds upon which we have seen jurisdiction is assumed over non-residents, is through the instrumentality of their per-

sonal property, as well as of their real property, within the oca, sovereignty. Hence it is that whenever personal property is taken by arrest, attachment or execution within a State, the title so acquired under the laws of the State is held valid in every other State, and the *same rule is applied to debts due to non-residents, which are subjected to the like process under the local laws of a State.*'—(Story on Con. of Laws, sec. 550.")

People vs. Gardner, 51 Barbour, 352: A resident of this State is not liable to be assessed and taxed here for his capital invested in loans in other States, upon securities taken and held in those States by his agents.

Whether the owner of property thus situated is liable to be assessed here, for it depends upon the question whether it can be properly and legally held to be within the State at the time of the assessment. As such property has no actual location or *situs* within the State, notwithstanding the owner resides here, it is not subject to taxation. *Catlin vs. Hall*, 21 Vermont Rep., 152, and *Hoyt vs. Commissioners of Texas*, 23 N. Y., 238, cited and approved. *Daniels, P. J.* It is clear that the property on account of which the assessment was made had no actual location or *situs* within the State. For the moneys loaned and the securities taken and held for the payment of such loans were actually in the States of Wisconsin and Illinois. So far as they were things having a substantial existence, they were so in those States, and not elsewhere. As such they were within the sole protection of the laws of those States. The validity of the agreements under which the loans were made, the protection of the securities taken for their payment, and the remedies provided for enforcing the securities, depended alike upon such laws. In neither respect did the relator derive any benefit whatever from the laws of this State. And the consideration from which the right to impose taxes has been theoretically derived, has therefore no foundation for its support so far as the assessment in controversy is concerned. Under that theory the government extending the security of its protection to property is justly entitled by way of taxes upon it to its ratable equivalent of the expenses incurred for the protection afforded to it. In this instance that was not done and could not be done by the government of this State. But it was done by the government of the States in which the loans were made, and the recompense for that service should justly be returned to the authorities of such States. This State has performed nothing whatever for which such recompense can be properly demanded by its authorities. But even though the assessment may have no just theory in fact to rest upon, the learned counsel, who with very great zeal and ability argued this cause on the part of the defendants, claimed that it was legal and valid because the statute of 1851 declared that the assessment should be made for all personal estate owned by the person assessed. Although this language is general and broad enough

to include all the personal estate of the person assessed wheresoever it may be situated, the court of appeals, in the case already referred to, have held that it should not be so construed, but that its terms must be so far restricted as to confine them to property within this State. The fact, therefore, that the property was owned by the relator was not alone sufficient to justify the action of the assessors. To produce that result the additional circumstance was equally essential, that the property should be within this State. Under this construction the original section contained in the revised statutes, and the second section of the act of 1851, must be read together, and then, instead of providing generally that the owner shall be assessed in the town or ward where he resides, for all personal estate owned by him, that section will provide that he shall be assessed for all personal estate owned by him within this State. When thus read, this is the plain and obvious meaning of the law.—(1 R. S. 5th ed., 905, S. 1; 908, § 5.)—In order to avoid the consequences of this exposition of the statutes, the same learned counsel very earnestly urged upon the consideration of the court, that as this property consisted of what the law denominates choses in action, being obligations of an intangible nature, it was within the State because the relator was its owner. That from its nature it must follow the person of him to whom the obligations are owing. By a legal fiction the personal estate of the owner has, for some purposes, been deemed to follow its owner. But in the adjustment of systems of taxation this fiction has been very generally rejected, on the ground that it was productive of unjust consequences, and other cases exist where for a like reason its application has been desired. As to visible and tangible personal property capable of having an actual *situs*, this fiction has not been allowed to prevail, so as to render such property liable to taxation when it was not within this State, even though the owner was here, (the People vs. The Commissioners of Texas, 23 N. Y. Rep., 224,) and the reasoning of the judge, through which that conclusion was reached, is equally applicable to the present case as it was to that, though it was not intended to be applied to a case of this description."

The following is a brief review of the cases cited by the plaintiff in error in this part of the case:

State of Nevada vs. Earle et al., 1 *Nevada Reports*, 396. This case, rightly considered, is an authority in favor of the Pennsylvania tax, and not against it.

Here the tax was on the *chose in action*, *i. e.* on the *note itself*, secured by a mortgage on property in Nevada. The court held, that as this note belonged to a non-resident, and was actually in the possession of that non-resident in California, that it—the note—could not be taxed in Nevada, the ground taken being that the thing taxed had no tangible existence in the

State of Nevada. But the court expressly declared that "each tangible piece of real or personal property within the State" might be taxed. Pennsylvania does not tax the *chose in action*, *i. e.*, the bond itself—but it taxes "tangible personal property," *i. e.*, the interest about to be paid on the bonds—which "tangible personal property" is actually "within the State," *i. e.*, in the physical custody of the treasury of the plaintiff in error, a Pennsylvania corporation.

City of Davenport vs. M. and M. R. R. Co., 12 Iowa, 541, *et seq.* This case only decides what was *the meaning* of a State statute.

And it was held that it was not the *intention* of the Legislature to impose the tax claimed by the city of Davenport. The question, whether had the tax claimed been really imposed, would it have been legal? was not before the court.

The tax was directly on the mortgage itself, which was in the custody and belonged to non-residents, and not on the interest, payable by the State corporation, and in its possession. The broad question involved in the construction of the Pennsylvania statute, did not arise in the case.

On page 546, the court say: "What property have these defendants in the mortgages given? What interest have they that could be levied upon, and sold or transferred? It is the value of the thing to the owner that the taxing power aims to reach, not that which is invisible or intangible," meaning the *chose in action*, or piece of paper called a mortgage, evidencing the debt and in the possession of the non-resident. Under the reasoning in this case, the Pennsylvania tax being on something "tangible," and actually in the treasury of the State corporation, and so capable of being "levied upon and sold or transferred" in Pennsylvania, would be subject to taxation there.

The State vs. Ross, 3 *Zabriskie*, 519 *et. seq.* Here, too, the tax claimed was upon the *chose in action*, the bonds themselves. The fact that the owner, a resident of Georgia, was temporarily in New Jersey, did not make it lawful to tax that *chose in action*. It was held that personal chattels actually in the State, though owned by non-residents, are subject to State taxation.

Latrobe vs. Mayor, &c., Baltimore city, 19 Maryland, 20. Here also the tax claimed was levied directly upon the mortgage itself.

People vs. Park, 23 Cal., 138. Here the tax was again on the mortgage itself, and the question was in which county of the State it should be paid, whether in that of the mortgagee or in the one where the land was situated.

People vs. Eastman, 25 Cal., 603. In this case the tax claimed by Mariposa county was assessed directly on a judgment obtained there by a resident of another county. Same as *People vs. Park*.

People ex. rel. Hoyt vs. Com. of Taxes, 23, N. Y., 225. Here the tax

claimed was assessed in New York against one domiciled in that State for capital invested in business in New Orleans, and respect to chattels upon his farm in New Jersey. *Held* illegal.

The reasoning in this case, pages 226 to 230, is strongly in favor of the Pennsylvania tax, and shows the fallacy of applying the legal fiction that the owner fixes the *situs* of personal property to the consideration of a question of this nature.

Ogden vs. Saunders, 12 Wheaton, 213–369. This has no possible bearing on the case.

It was held here that a discharge under a State insolvent law could not be pleaded out of the State, nor against a non-resident creditor suing in the United States Circuit Court.

Hood's Estate, 9 Harris, 106. Here testator was domiciled in Cuba at the time of his death. The Register of Wills of Philadelphia adjudged the payment of collateral inheritance tax on legacies to persons living in Philadelphia, which legacies were payable out of crops of testator's sugar plantation, situated in the island of Cuba. The register's court held that the legacies in question were not subject to collateral inheritance tax in Pennsylvania, and the Supreme Court affirmed the decision. Here neither the person nor the property was within the jurisdiction of the State.

Short's Estate, 4 Harris, 83. Here it was decided that all the personal property of a decedent domiciled in Pennsylvania was subject to a collateral inheritance tax there without regard it its actual *situs*. But this was upon the express ground that for convenience of distribution of decedent's estates, the law of the domicil governs and gives a fictitious *situs*, and this by the universal acquiesence of all States, and for the reason that it is necessary to effect distribution according to a uniform rule.

M'Kean vs. County of Northampton, 13 Wright, 519. M'Kean was domiciled in Pennsylvania, and owned shares of stock in a manufacturing company in New Jersey. It was held,

1. That this gave him no ownership in the real and personal property of the corporation there.

2. That the shares of stock in his hands in Pennsylvania were subject to taxation here.

IV. *The Pennsylvania acts do not impair the obligation of the contract of the company with its bondholders.* The corporation pays no less interest, but a part of it is diverted to the State as a tax on the bondholder, who is made in common with the citizens of the State to pay for the value given to his property here through the grant of the franchises of the corporation and the protection afforded to it by the State.

Osborn vs. U. S. Bank, 9 Wheaton 859. The question was as to power of the States to tax the bank.

The Court said: "The foundation of the argument in favor of such right is laid in the supposition that the corporation was originated for the management of an individual concern to be founded upon contract between individuals having private trade and private profit for its great end and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation engaged in its own business with its own views, would certainly be subject to taxing power of State, as any individual would be."

[The bank was held exempt, because a public institution, a part of the Government.]

Providence Bank vs. Billings & Pittman, 4 Peters, 514. In November, 1791, the Legislature of R. I., chartered an association which had been formed to carry on a banking business, under the name of "President, Directors and Company of the Providence Bank."

In 1822, the Legislature of R. I., passed an act taxing the capital stock of the banks actually paid in.

The Providence Bank brought an action of tresspass against the officers levying the tax. It was decided in favor of defendants. But this court reversed judgment and *held*—the tax did not impair the obligation of a contract.

Page 560—The plaintiffs argued: "The charter authorizes the bank to employ its capital in banking transactions for the benefit of the stockholders. It binds the State to permit these transactions for this purpose. Any law arresting directly the operations of bank would violate this obligation and would come within the prohibition of the constitution. But as that cannot be done circuitously which may not be done directly, the charter restrains the State from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may unquestionably be carried to such an excess as to take all its profits, and still more than its profits for the use of the State, and consequently destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle. A power, therefore, which may in effect destroy the charter is inconsistent with it, and is impliedly denounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point or exercised in moderation, it is the same power and is hostile to the rights granted by the charter."

Ch. J. Marshall denied this proposition.

Page 561: "It would seem that the relinquishment of taxing power is never to be presumed."

Page 562: "Land, for example, has in many of the States, perhaps in

all, been granted by the government. This grant is a contract, the object of which is that the profits issuing from it shall enure to the benefit of grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of a contract?"

The power of taxation operates on all the persons and property belonging to the body politic. This principle has its foundation in society itself.

Gordon vs. Appeal Tax Court, 3 Howard, 133. The corporate property of bank is separable from its franchise, and may be taxed unless there is a special agreement to the contrary.

(This was a case where the State agreed not to lay any further burthen on the banks upon condition that they made a road and paid a school tax.)

P. W. & B. R. R. vs. Maryland, 10 Howard, 393. There is no reason why the property of a corporation should be presumed to be exempted, or should not bear its share of necessary public burthens.

The court has held on several occasions that taxing power is never presumed to be relinquished, it must be expressed in *clear and unambiguous terms.*

Jefferson Branch Bank vs. Skelly, 1 Black, 436. The rule of construction is strict against the corporators, and in favor of the public, and neither the right of taxation nor any other power of sovereignty will be held to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.

Gilman vs. City of Sheboygan, 2 Black, 510. Where a State Legislature authorizes a city to borrow money, issue bonds and tax all the property in the city to pay it, this is not a contract with the bondholders that the State shall not afterward exercise her power to modify the taxation, or exempt portions of the property from taxation.

The city under an act of the Legislature issued bonds, and it was provided that a tax should be levied upon *all* the taxable property of the city for payment of said bonds. The plaintiff in error argued that the bonds were issued and taken upon the faith of that act, and that its provisions were a contract with the bondholders.

The Legislature subsequently enacted that only the real estate should be taxed to pay said bonds and interest.

The fact that a State, by act of Legislature, has stripped herself of any portion of her sovereignty is not to be assumed, unless the language is too clear to admit of doubt.

Society for Savings vs. Coite, 6 Wallace, 606. Unless exempted in terms which amount to a contract, the privileges and franchises of a private corporation are as much the legitimate subject of taxation as any other property of the citizens, which is within the sovereign power of the State.

Affirms the decisions that the taxing power is never *presumed* to be relinquished.

Curtis vs. Whitney, 13 Wallace, 68. A statute does not necessarily impair the obligation of a contract because it may affect it retrospectively, or because it enhances the difficulty of performance to one party, or diminishes the value of the performance to the other, provided that it leaves the obligation of performance in full force. A statute which requires the holder of a tax certificate, made before its passage, to give notice to an occupant of the land, if there be one, before he takes his tax deed, does not impair the obligation of the contract evidenced by the certificate, which stated that she would "be entitled to a deed of conveyance of said land in three years from that date, unless sooner redeemed according to law."

Miller, J: "Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that may be affected in many ways by State and National legislation. For such legislation, demanded by the public good, however it may retroact on contracts previously made and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution so long as the obligation of performance remains in full force."

V. *The power to tax existing, it cannot be restrained by any court, and the prudence of its exercise is not a judicial question.*

People of New York vs. The Tax Commissioners, 2 Black, 620: "The taxing power, so far as it is reserved to the States and used within constitutional limits, cannot be controlled or restrained by this court, the purdence of its exercise not being a judicial question."

St. Louis vs. The Ferry Company, 11 Wallace, 429: "When called into activity there can be no limit to the degree of its exercise (*i. e.* the taxing power,) except what is found in the wisdom of the law making power, and the operation of those conservative principles which lie at the foundation of all free governments."

VI. *The tax on the bonds or interest thereon of the plaintiff in error is not forbidden by any provision of the Constitution of the United States, or any statute thereof.*

VII. *The laws of most of the States are similar in this regard to those of Pennsylvania.*

F. CARROLL BREWSTER,
Attorney General.
JAMES W. M. NEWLIN,
For defendant in error.

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Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA,

DEFENDANT IN ERROR.

Brief of Plaintiff in Error on Motion to Dismiss Writ of Error.

Allen Lane & Scott's Printing House, 233 South Fifth Street, Philadelphia.

Supreme Court of the United States.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF OF ARGUMENT BY PLAINTIFF IN ERROR ON MOTION BY DEFENDANT IN ERROR TO DISMISS THE WRIT OF ERROR FOR WANT OF JURISDICTION.

I. It is not material here to consider the specifications of objection to the settlement of the auditor general. No objection was taken in the court below to the deposition of Mr. Odell, which proved the non-residence of a certain number of the bondholders, and the question, therefore, is not whether or not it should have been rejected upon the hearing of the appeal, under the specifications, but whether indeed the statutes of Pennsylvania imposing the tax was drawn in question as being repugnant to the Constitution of the United States, and a decision

made in favor of its validity. This question, of course, is to be determined by the record of the trial upon the appeal, and not by the specifications of objection to the assessment. If, by the record of the trial, the evidence, charge of the court, and judgment, it appear that the constitutional question was raised and decided, no question, under the specifications, can arise here on the subject of want of jurisdiction in this court. That afforded mere matter of objection to evidence in the court below; but if admitted, even in error, cannot be complained of when the effect was to raise and cause the constitutional question to be decided. There is no embarrassment, therefore, on the ground that the fourth specification was not more particular, or that it did not state the ground upon which the exemption from taxation was claimed, although it is not admitted that it was deficient in any requirement.

II. It does certainly appear from the record of the trial that the question of the unconstitutionality of the act of 1864 was raised and decided; indeed, no other point was raised or decided. This appears:

(*a.*) From the evidence, in the course of the trial. There was no contradiction of the fact that, of all the bonds due, $2,661,500 at least were certainly owing to and held by persons non-resident in Pennsylvania. (Transcript, page 11.) Although, therefore, the exemption from taxation claimed was co-extensive only with the amount of bonds held by such non-residents, no question on the fact of the number of the bonds so held was submitted to or passed upon by the jury. The bonds to the amount above stated could not therefore be held taxable, except on the ground that, although so held, they were taxable, and that the act imposing the tax was not repugnant to the national Constitution. It need not be said that the fourth specification, "that said bonds are *principally* held by non-residents," is not any part of the issue found by verdict, and cannot be referred to as a basis for the supposition that the jury found that *none* were so held. No such issue was raised or decided.

A constitutional question depending upon matter of fact can be shown or will arise only during the trial upon the admission or exclusion of evidence. If the deposition of Mr. Odell had been objected to or excluded, the point would have been at once raised and decided. Its *admission as certainly raised* the question subsequently decided by the charge of the court and verdict of the jury.

All the evidence in the case is in the bill of exceptions, which is made up, as the practice is, by filing the judge's notes of trial, as in this case.

See Medberry *vs.* State of Ohio, 24 Howard, 414. Whether this court has jurisdiction can be ascertained either from the pleadings or by *bill of exceptions*, &c.

Lawler *vs.* Walker, 14 Howard, 147. It (the ground of jurisdiction) must appear in the pleadings of the suit, or *from the evidence in the course of the trial*, &c. And see Parmalee *vs.* Lawrence, 11 Wallace, 36, per Nelson, J.

As the evidence shows this question to have been the only one raised, and as the only ground upon which it was offered, and could have been admitted, was the unconstitutionality of the act, so far as it affected such non-residents; and as, notwithstanding over $2,000,000 were shown, and not denied to have been so held, it appears, by necessary intendment, that the cause was decided on the ground that the act was constitutional.

It is sufficient, if it appear by clear and necessary intendment from the record, that the question of constitutionality *must* have been raised and decided, it need not appear in *terms*.

The Victory, 6 Wallace, 384, Miller, J., said, "The proposition that if the record shows by necessary intendment that the point was decided, it is sufficient, is fully conceded, and does not need support."

Furman *vs.* Nichol, 8 Wallace, 56, Davis, J., said, "It is urged that the particular provision of the constitution which is alleged to have been violated should be contained in the pleadings, *but this is in no case necessary*. If the record shows, by express averment, and by clear and necessary intendment, that the constitutional question did arise, and that the court below

could not have reached its judgment without applying it to the case in hand, then jurisdiction attaches."

See this case particularly upon the facts as stated in opinion, pages 56–7.

(*b.*) But the *charge of the court to the jury* shows the constitutional question to have been raised and expressly decided. (Pages 12–15 of transcript.) The court gave a binding instruction to the jury, that the corporation was required to pay the tax, and to have retained from the bondholders.

The charge is certainly part of the record; it comes up in the bill of exceptions, and even supposing the practice of excepting to the entire charge is a bad one, it is nothing else; and, if permitted by the court below, makes the charge part of the record.

See Lawler *vs.* Walker, and Parmalee *vs.* Lawrence, *supra.* The ground of jurisdiction must appear in pleadings, from evidence, in the instructions asked for or from exceptions taken to the ruling of the court.

Armstrong *vs.* Treasurer of Athens County, 16 Peters, 285. "The ground of jurisdiction must be shown. * * Secondly, *by the direction given by the court*" * *

None of the cases cited by defendant exclude the charge of the court *to the jury* from review, for the purpose of ascertaining whether the court has jurisdiction. Such a decision would be incomprehensible as applied to a charge contained in a bill of exceptions.

In 6 Wallace, 143, Rector *vs.* Ashley, there were cross bills to quiet title to land. The *Supreme Court* of Arkansas gave an *opinion*, forming no part of the record sent up.

In 8 Wallace, 317, Gibson *vs.* Choteau, after an affirmance in Supreme Court of State, there was a motion for rehearing, which was granted, the affirmance set aside, rehearing had, and judgment reversed, upon which an *opinion* of court was delivered and filed. Held this opinion could not be looked at.

12 Wheaton, Williams *vs.* Norris, page 117. Some additional papers—opinion of one of the judges, supposed to have delivered and filed as the opinion of the Supreme Court—were brought up

by *certiorari*. Marshall, C. J., said, "An opinion, *not given to the jury*, pronounced after verdict,—and consequently having no influence upon it,—stating merely the course of reasoning, may explain views of court, but cannot constitute part of the record."

(c.) But further. This is a writ of error to the *Supreme Court of Pennsylvania*.

It cannot be pretended that the judgment of that court did not expressly pass upon the constitutionality of the tax, and affirm its validity as regards non-residents.

See the assignments of error, pages 17 and 18, and *judgment*, page 18, referring thereto.

See 8 Wallace, 317, Gibson *vs.* Choteau. Judgment was entered in the Supreme Court, *q. v.* Miller, J., said, "If we look to the *language used in the judgment* of the court in setting aside its judgment of affirmance and granting a rehearing in the final judgment of reversal, we can see nothing to justify that inference, &c. (of the decision of a constitutional question).

Here a reference to the language of the judgment shows the cause to have been necessarily decided upon such question.

JAMES E. GOWEN,
For Plaintiff in Error.